

THE DEVELOPMENT OF THE STATE

ITS GOVERNMENTAL ORGANIZATION
AND ITS ACTIVITIES

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PREFACE

THIS work contains in brief form the essential principles of the development of the state, its several governmental agencies and its activities.

The writer has endeavored to show that the state develops in accord with definite laws and principles, and that these are largely determined by the conditions of economic and intellectual life. Progress comes therefore by purposive modification of such conditions through a governmental policy based on scientific knowledge.

An attempt to cover so broad a field necessarily involves neglect of details and occasional poverty of illustration, but numerous references for wider reading and further study may in part atone for imperfections of that sort.

It is hoped that from this epitome of the development of the state, the student and the general reader may obtain an outline of political organization and activity, so coördinated, that he will be able to understand more clearly the meaning of political institutions. In this age of democracy it is needful that all citizens comprehend the meaning of world politics, as well as the more humble field of national administration.

Other things being equal, power goes to the state most capable of wielding it, and national greatness ultimately depends on an intelligent citizen-body striving for

a definite end. A knowledge of governmental development should make more clear the means to be utilized for the attainment of that end, and what that end should be. These means, it is argued, are general economic well-being and intelligence, the fundamental conditions for the maintenance of democratic forms of government.

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BROWN UNIVERSITY,
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PART ONE

SOCIAL AND POLITICAL DEVELOPMENT

CHAPTER I

SOCIAL DEVELOPMENT

THE progress of mankind has been made possible through a continuous development of social institutions.

Social institutions. Primitive human beings, banding themselves together into natural groups, began slowly to rise above the harsh conditions of mere animal existence, as they attained through the struggle for survival greater mental capacity and the power to satisfy their increasing needs. During the course of this social development men have from the beginning formed aggregations and associations for purposes of social utility, and in these associations arise innumerable social relationships, by the aid of which all men may find their truest and best life. Every man is born into such relationships; his training and character depend largely on his associates, and his attainment and success in life are determined chiefly by the social influences and institutions that environ him.

Social institutions unitedly form the social order, or organization. Through them are conserved the contributions of bygone ages to civilization, and without them social life would lack unity and stability. Primarily these institutions were developed either for the purpose of training or instruction, as, for instance, the institutions of the family, the church and the school; or for

the purpose of securing food supplies and other physical necessities—our economic institutions; or in order to safeguard and strengthen the entire social life of society. The institution developed for this purpose is the state, the dominant social institution of the day.

Though it is customary to study these several institutions separately, yet social life must be considered as a unit, since every important modification in social life affects all aspects of that life, its several phases are parts of a common experience, and the same conditions and causes in varying degree affect alike all social institutions. In this century, therefore, when fundamental changes are taking place in social organization, a knowledge of the development of civilization as a whole becomes important. This study is one of the branches of sociology, and is an attractive department of modern knowledge. In order, therefore, to see the relative place and importance of the state in social life, it may be well to indicate briefly the broad periods of civilization through which society has passed.

The Growth of Civilization

Civilization has been defined in many different ways, but practically all definitions are based on certain fundamental ideas: (1) that man attains civilization as he masters and utilizes the materials and forces of nature about him; (2) that in achieving this mastery he develops large brain capacity; and (3) that this greater mentality is best seen in the higher faculties of the mind, such as the powers of generalization, abstract reasoning and creative imagination. A

Meaning of
civilization.

highly civilized race, therefore, should have a great measure of control over natural conditions, high mentality, idealism and philosophic insight. A race low in civilization would on the other hand be not far removed in attainment and mentality from the higher forms of animal life.

In tracing the development of civilization it is usual to divide its earlier period into stages, each characterized by some particular social attainment, either material or intellectual. Attention may, for instance, be directed to the substance used in the making of tools. The earliest human beings who became "tool-using animals" presumably used sticks and roots or branches of trees as primitive hammers and weapons. At a later period pieces of heavy stone were fastened to wood either by thongs or by insertion. Still later these stones were polished so as to give a better cutting edge and a more ornamental appearance. Then came the age of bronze or copper, in which were used soft metals that could be beaten into shape while in their natural state. In the last stages of early civilization, when the use of fire was understood, hard metals, such as iron, came into use through smelting, and civilization was then ready for the massive machinery of modern times, whose introduction depended on scientific knowledge as to the utilization of the powers of steam and electricity. Other writers prefer to trace civilization by noting the chief sources of food supplies for human beings. At first natural foods which could be obtained by man without tools or weapons were consumed. Then came, in addition, food supplies from

Its earlier
stages.

hunting and fishing. Still later, through the domestication of animals, came permanent supplies of flesh foods, and then agriculture made its important contribution toward the sustentation of the human race. Others emphasize the development of the chief forms of occupation, such as the wild and precarious life of the hunter, the care of flocks and herds, the pursuit of agriculture, and finally the occupations involved in the trades, in commerce, manufacturing and professional pursuits. Others fix their attention on the evolution of the notion of property in land and personal possessions and discuss three stages: (1) that in which the notion of the ownership of land and other forms of property was unknown, (2) that in which land and other property¹ were considered as held or owned by the community as a whole, and (3) that in which land and other property are considered to be the personal possessions of individuals.

Still other writers prefer to trace civilization through the varying forms of the family and indicate a threefold development: (1) a matriarchal² stage, characterized fundamentally by kinship traced through the mother, and the absence of permanency in family life; (2) a patriarchal stage in which kinship is traced through the male, and the power of the paternal head of the family tends to become absolute; (3) the modern stage in which kinship is traced through both parents and emphasis is placed on

Civilization
traced
through
certain
institutions.

¹ Except such personal possessions as weapons, tools, ornaments and clothing.

² Metronymic is the better term, but the other is more familiar by usage.

a permanent marriage relationship between one man and one woman. Other writers would trace civilization by a study of the development of religion through its historic stages, such as animism, ancestor and nature worship, polytheism, pantheism and monotheism. Others may trace it in the several stages of morality, starting from primitive notions of utility and its opposite, as shown in the customs of savages, and leading on to theories of abstract morality such as those taught by philosophers and theologians. Still others prefer to emphasize the attitude of men's minds toward explanations of the mysteries of the universe in terms of natural causation; or toward authority, by calling attention to the individualistic attitude of mind among developed peoples as contrasted with the passivity and conservatism of backward races.

It is hardly necessary to enumerate other explanations of development set forth by sociological writers.

The
progress of
civilization. The very fact that the progress of civilization can be indicated under so many aspects shows that these are but specialized phases of one great movement of a unified social life, manifesting itself under many different forms, but all alike teaching that mankind is rising from primitive savagery to higher and more ethical, more intellectual stages of development. Evidently, therefore, even the most advanced peoples have not yet attained the highest possible development. Even the best of them are low and savage when compared with the ideals of social perfection taught by the noblest representatives of humanity in ages past and present. Further development is still possible, and

every wise utilization of the materials and forces of nature and every upward step in intellectual and moral attainment will aid in the furtherance of social progress.

Conditions that Affect Social Development

It is evident from the foregoing survey that physical and psychological conditions may largely affect the development of social institutions, and so important is this influence that for the student of politics further explanation becomes necessary. Attention should in the first place be directed to the influence exerted on political development by the climate, by the fertility and mineral wealth of the soil and by the contour and configuration of the land with its sea-coasts, harbors, rivers and lakes, so necessary for the promotion of domestic and foreign commerce. Consideration should then be given to the population, noting its numbers, virility and physical stamina. In the third place should be studied the qualities of the mind, such as keenness of insight and the powers of mental endurance and adaptability. A flexible type of mind, able to balance the old and the new, and to decide wisely under changing conditions, is a factor of prime importance in political development. Such conditions as these will of course manifest themselves in the kind and extent of education imparted in any given community, in its customs and in the strength of its social institutions. They will be indicated also in the political and economic capacity of the people and in the feeling of political unity that must necessarily be manifested, if a state is to make the progress demanded by its oppor-

tunities. The chief points under these three topics may now briefly be indicated.

I. Communal life, which is essential for political growth, develops only when abundant food supplies attract masses of population. Communities, therefore, first developed in fertile river valleys, in well-watered plains with warm and equable climate, where game was plentiful, pasturage possible and agriculture easily productive. These natural advantages, however, are not sufficient. There are other needs besides that of food. Even in the formative or primitive stage there was a demand for hard woods, flint and jade, colored earths, clay, fibrous plants and primitive luxuries. Locations furnishing such supplies were eagerly sought out, and the possessors of the land developed a rude system of barter with hordes less richly supplied. As civilization advanced, metals came to be necessities, and mines were sought for in all directions. Explorers and traders established centers of commerce wherever mines were found. Great city states and empires rose one after the other, rising as they became the centers of trade between wealthy and populous regions, and falling as other and better regions were discovered or shorter and safer routes were developed. In this way rose and fell the empires of the East and the later civilization of Persia, Greece and Rome, as the mining wealth of India, Arabia and Africa, Asia Minor, Southeast Europe and the outlying countries fringing the Mediterranean was discovered and utilized.

The domestication of animals and the utility of some

of them as beasts of burden developed the caravan and the long overland routes of Asia. Water transportation along the dangerous shores of southern and southwestern Asia lagged far behind, but when civilization reached the eastern shores of the Mediterranean, Phœnicia, the first Mistress of the Seas, pushed westward as far as the Atlantic seeking metals, establishing colonies, and carrying with her the flourishing civilization of the East. After the Phœnicians came the Greeks, born colonists and keen traders, who, building on the contributions of ancient civilization, with versatile mind continually sought after "some new thing"¹ and thereby developed the highest type of ancient civilization. After them came an empire of exploitation, a nation with a developed capacity for war, administration, order and law, which conquered and absorbed one after the other ancient civilizations and barbarian tribes, bringing all under the common yoke of Rome. But it was a nation lacking imagination, uninventive and ultraconservative; it failed through lack of adaptability; it lacked the scientific attitude of mind; it knew in economics only exploitations and devastation; and with all its political experience and its capacity for law and administration, it failed to establish the state on sound economic foundations. The collapse of the western Roman empire drove civilization back to the East and to the South, where it flourished for nearly a thousand years longer, at Constantinople, and in Persia and northern Africa. Western Europe barely held its own for five hundred years, but then came in

¹ Acts xvii, 21.

the tenth century the discovery of metals in the Harz Mountains, the rise of German and Italian cities and the crusades.¹ These greatly aided European civilization by the destruction of many turbulent robber barons, the redevelopment of commerce with the East and the consequent inflow of the intellectual attainment and culture of Greek and Saracen civilizations. The use of the compass opened new routes to the East and rendered possible the discovery of America. This discovery made western Europe, for the mineral wealth of Mexico and South America poured into its cities, and the great expansive movement westward in commerce and colonization gave new vigor and energy to its seafaring nations.

When the era of steam began in the eighteenth century, first the demand for cotton and cotton goods, and then for modern machinery, gave England and the United States of America their opportunity, through their possession of immense beds of coal and iron. To-day the competing nations are searching the world for accessible stores of metal ores, fuels, oils, building stone, forests and fertile plains suited for grazing and agriculture. These are first and necessary conditions of a nation's material prosperity. Then if other factors be present, such as facilities in transportation, skilled and unskilled labor, open markets and an energetic population, a basis exists on which may be built up a great and mighty civilization.

II. In considering the effect of population upon political development, several points must be taken into con-

¹ Note in this connection Brooks Adams, "The Law of Civilization and Decay."

sideration. (1) It is obvious that, other things being equal, the numerical greatness of a people is a distinct advantage in competition, whether in war or for economic supremacy. The chief factor in determining the number of a population is the food supply. Among savage peoples, when population presses too closely on food supplies, the weakest are regularly put to death and perhaps consumed as food. From this necessity probably arose the customs of infanticide and the slaying or exposing of the aged or infirm. The custom of infanticide was practised also by patriarchal peoples, as, for example, among the ancient Greeks and Romans, and to-day in China. Population is also reduced by the excessively high rate of infant mortality among uncivilized and semi-civilized peoples, and by wars, famines and pestilences.

Among civilized communities the standard of living plays an important part in determining the increase of population. The demands of social life are so numerous and expensive that the higher social classes tend to restrict the number of their offspring either by natural or unnatural means. The wisdom of this "race suicide" is open to question from the standpoint of social and national development, but the entire matter is debatable. (2) A dense population is not really an advantage to a state unless the masses of the people have a sufficient and varied food supply, so as to develop strong physiques able to endure hardship and to resist disease. Under such conditions, at least in a competitive age, there develop in men masterful, manly and aggressive qualities of mind. If population

The
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presses too closely on food supplies, the people, poorly fed, become physically inert, passive, sickly and lack mental energy. Such persons, compelled to live from hand to mouth, become improvident, lack ambition and the higher qualities of the mind, and remain low in civilization and character, even though the wealthier classes of the community are comparatively high in civilization. This evil is seen at its worst in the tropics where the per capita amount of necessities is so small, and the fertility of the soil so great, that the land fairly swarms with millions who barely exist in times of plenty and who die by the thousand in times of famine and pestilence through lack of physical vitality and through mental inertness.¹

The virility of a population also depends to some extent on the stimulus of economic opportunity and of the intellectual and social environment. Under favorable conditions human beings easily become economically versatile, but, when narrowed by the dreariness of a monotonous life and occupation, they lose ambition. On the other hand, a mind well trained by proper education and stimulating social influences, reacts on the body and quickens its activities. Freedom from anxiety also, due to the knowledge of the safeguards of well-enforced law, is a powerful stimulant to physical energy along economic lines. When such conditions are favorable, there readily develops an energetic and aggressive spirit that brings to the front the explorers, merchants, inventors and thinkers

¹ In respect to this subject note in Bibliography works by R. Russell.

of the age. No one, to be sure, should assert that an inert peon, by increase and variation in diet, would at once become an aggressive American; but, undoubtedly, several generations of the sustenance and training which Anglo-Saxons have had, would make the descendants of that peon much more forceful persons than their ancestor. Cæsar had a rather poor opinion of the fighting and staying capacity of our Germanic forefathers, but unquestionably an American Rough Rider regiment would have a similar opinion of Cæsar's legions, if they should ever meet in combat on the Elysian fields.

III. Brain capacity and mental character are most important considerations in estimating the worth of a population. A savage, like an animal, has no concentration of mind and lacks imagination. He is savage in disposition only when ill fed or ill treated. Otherwise he is peaceable, good-natured and indolent. Patriarchal life, holding as it did the mass of its population at hard labor, developed in them patient endurance and tireless industry, but no high mentality. That developed in the elders and masters, who, having much leisure, besides domineering, aggressive qualities, developed also mental acumen and philosophical insight, always characteristic of the higher classes of patriarchal systems. Commercial life demands aggressiveness, ingenuity, mental alertness and ruthlessness in stamping out opposition. An age of production through machinery demands scientific insight, executive capacity and ability to master details. In the type of the dominant peoples of western civilization we find a composite of these qualities. Civilized

The
mentality
of a people.

man is regularly ruthless and merciless to an opponent, but is kindly and sympathetic when opposition has ceased. He is guided by ideals when material interests are not involved, but is selfish and covetous at the possibility of gain. He is masterful in dealings with inferiors, resourceful when necessity arises, capable of patient toil and hardship, yet is fond of ease and relaxation. Energetic, keen-minded, inventive and idealistic, he combines in himself the best and the worst of humanity. He is a savage becoming a god, and has shown great natural capacity in both directions.

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CHAPTER II

STAGES IN THE DEVELOPMENT OF THE STATE

WITH this outline of the development of civilization as a background, it will now be possible to consider at more length the several stages in the development of the state. These stages, it will be found, are closely associated with the conditions of economic life, and for that reason economic periods of development will form the best basis for an historical study of the state. The periods chosen may briefly be indicated as follows:

The
four stages.

I. The formative or primitive period, based on the occupations of hunting and fishing, and lasting to the development of a pastoral and agricultural mode of existence;

II. The period of settled social institutions characterized by the definite occupations of grazing and farming, and by the growth of property rights;

III. The period of urban civilization, developed through the growth of commerce and international trade; and

IV. The period of industrial civilization emphasizing production through the utilization of the materials and forces of nature.

In these last two stages the specialized occupations incident to commerce and manufactures supplement the

fundamental occupations of the earlier periods. The first period, often referred to as the primitive age, or the age of savagery, emphasized natural foods, the occupations of hunting and fishing and the use of stone implements. The second period, the age of fixed, static or patriarchal civilization, made use of flesh foods and grains, obtained through the occupations of pastoral and agricultural life, and made use of soft metals and, to some extent, of iron. The third period, the age of commerce and urban civilization, added to former occupations those involved in transportation and international trade, making also a large use of iron, and gaining food to some extent by exchange of goods for needed supplies. The fourth period, characterized by a complex and centralized social organization, emphasizes industrial occupations and abundant productivity through the utilization of the materials and forces of nature by means of machinery. Each later period includes what has gone before, but with diminishing emphasis. Hunting, for example, becomes a diversion more than an occupation, and foods from the soil are substituted for flesh as the "staff of life."

It must not be supposed that these periods are synchronous for all mankind. They represent grades of development and apply to racial and national groups of men, not to mankind as a whole. The larger half of humanity ¹ is still in one or the other of the first two periods, chiefly in the second; some nations after passing into the third period have sunk back into the second; ²

¹ China, India and most of Russia, for example.

² Asia Minor illustrates this change.

the last period applies only to a numerically small part of humanity made up of the most advanced modern nations.

I. The Primitive Period

In earlier primitive times human beings must have been little removed from the conditions of the beasts about them. They had no tools, no permanent marriage ties, few or no religious beliefs, nothing worthy of the name of state, and subsisted, like animals, on what nature spontaneously produced. In later primitive times, some knowledge of which is fairly well supplied from a study of relics and fossil implements, and from observation of low civilizations still existing, men had become far superior to the members of the animal world. They knew the use of fire, and had devised weapons, industrial and household implements and the canoe. They erected rude houses, and made use of clothing, partly for protection against the inclemency of the weather but chiefly for purposes of ornamentation. Personal ornaments, rude drawings, idol or image-making, and the monotonous rhythm of their musical implements, dancing and singing, all testified to the beginnings of esthetic development. The voice had been trained into articulate speech. The mysteries of religion were manifested in fetishistic and animistic beliefs under the guidance of the conjurer and the medicine man. The natural matriarchal family of earlier times was still the dominating type, but was developing tendencies looking toward the patriarchal form. Personal property rights can hardly be said to have de-

The age of beginnings.

veloped, except that weapons, ornaments and clothes were individual possessions. Ownership in land was unknown, except that each savage horde had hunting grounds beyond which its members went at their own peril. Such an age was plainly the age of beginnings. Men were no longer beasts but neither had they much civilization. Evidently in such a low stage of social life little should be expected along lines of political development. Yet the germs of practically all we have to-day may be traced back to those early times. The nation was represented by the horde,¹ a loosely organized mass of human beings not necessarily closely akin, but yet bound by ties of common descent, customs and language. The horde was not a permanent organization by any means, yet it held together for purposes of food-getting, offense and defense, and for social or convivial gatherings.

Long-established customs tracing their descent from time immemorial, and prohibitions in the form of tabus represented early law, which was enforced by public opinion under the guidance of the elderly men of the horde, who, as persons of wide experience and larger knowledge of traditions, were deemed wise. Intercourse between hordes was regulated by a fairly definite mode of procedure, the germ of diplomacy and international law. Here surely seemed to be all the elements necessary for the existence of the state—authority, law, procedure and a unity organized

The embry-
onic state.

¹ There is much diversity in respect to the terminology applied to the several forms of early human groups. To avoid confusion, therefore, the reader should carefully observe the idea conveyed in this text by the words *horde*, *tribe* and *clan*, and should remember that the same groups are named differently by different writers.

for purposes of common utility and protection. Yet there was lacking the element of permanency, permanency in interests, in organization and in purposes. For as long as a community depends entirely on hunting and fishing for a precarious subsistence, nothing really permanent in civilization can develop. In such a stage of life hordes of men and women moved about from place to place seeking food supplies. When food was abundant, the pleasures of feasting and companionship increased the membership of the horde. But when food became scarce, the horde lost its unity since its members scattered far and wide so as to maintain life more easily. Under such conditions there could be no permanent home, no opportunity for the steady development of law, order, discipline and morality, no time for mental development except along lines of cunning competition with hostile beasts and savage men. Physical instincts, derived from animal ancestors, modified by custom and the rule of force, and perpetuated by hard experience were the chief factors in life. Continuity of purpose and forethought were unknown. Men lived from hand to mouth in a desperate struggle for existence, and by no possibility could develop a state. Yet the conditions were present that at a later stage allowed the elements of the state already in existence to develop into a definite body politic, exercising sovereign authority over a permanently settled community.

II. The Period of Settled Social Institutions

Several factors contributed to the development of higher civilization among many of these primitive

hordes. The needs of the body compelled greater ingenuity in the manufacture of hunting weapons as well as cunning and skill in the use of them against human enemies, whose flesh in those days supplied a much-desired variety in daily food. Women developed patient endurance, medicinal knowledge and inventive power, as they plied their tasks of rearing the young, gathering edible vegetation, preparing food, weaving, house-building and ornamentation of all sorts. If the higher mentality of a horde met its reward in the shape of more abundant food supplies, improvement in the physique furnished the conditions for the possibility of a still higher mental development. Some ingenious community at last hit on the happy expedient of saving alive the young of wild animals, domesticating them, and thus by the exercise of a little foresight and self-denial, it was enabled to keep food supplies on hand against times of scarcity. This discovery of human supremacy over animals susceptible of domestication, gave an immense impetus to civilization. Transient hordes became firmly compacted tribes held together by the common ownership and use of plentiful food supplies in the form of flocks and herds. The vague boundaries of hunting grounds became definite areas of excellent grazing lands fiercely defended against envious aliens. For the possession of flocks and herds meant war with hungry neighbors. Hence developed better weapons, wiser leadership, braver men, who as shepherd-warriors were prepared to defend their wealth against all comers. Such an aggressive mode of life developed masterful qualities in the men; women were rel-

egated more and more to the inner life of the group and with the increase of domestic responsibilities, tended to become household drudges. The abundance of flesh foods gradually banished cannibalism, especially when it was perceived that the enforced labor of a captured foe was of more utility than his body as food. Permanent food supplies, more leisure and greater mental capacity gave opportunity for meditation, and as a result came clearer ideas in regard to the supernatural. Crude animistic beliefs changed into theories of nature and hero divinities, preparing the way for later systems of nature and ancestor worship. The possession of permanent sources of wealth brought about social distinctions between the rich and the poor, the master and the slave.

Though many centuries probably elapsed in the transition from the old to the new, a period filled with curious

blendings of primitive and patriarchal civilization, yet slowly but surely the higher civilization supplanted the lower. In place of the

Elements of
permanency.

horde came the tribe; the growing importance of the male was marked by the semi-slavery of the women and the rise of the patriarchal family in place of the matriarchal. Continuous wars brought about clear notions of leadership, authority, subordination, law and social regulation. A more permanent communal life developed mental capacity, social institutions, wiser traditions, greater ingenuity in the manufacture of tools, weapons and household conveniences. All this had its influence on the developing state. There came a permanent tribal life, definite social institutions, clear-cut

notions of authority and law, and a recognition of a social welfare, to be fought for and strengthened, even, if necessary, at the sacrifice of individualistic well-being. In such conditions are to be found all the essentials of a state, not so well defined as in modern times, but yet a state in all fundamental features.

The patriarchal period attained its maturity with the development of agriculture. No one knows who first
 Agriculture. planted seed in the ground with the thought of ultimately reaping its product. Possibly the knowledge of seed-planting may have existed even in early primitive times, but certainly as long as men lived here to-day and there to-morrow such knowledge was of no practical use. No one would care to plant seed that another would almost certainly reap. But when communities came to have fairly well-defined boundaries within which they might roam, and when in the pastoral period a diet so largely of flesh demanded some variation, chance experiments, natural appetite, a little reflection and forethought, probably all contributed to the development of a rude system of agriculture, merely to supplement the food supplies furnished by flocks and herds.

This again gave a great impetus to civilization. For as population increased men had to depend more and
 Slavery. more on agriculture for food supplies. A community that relies chiefly on flocks and herds for food needs much more land than one that depends chiefly on agriculture. As the competition for fertile grazing lands became keener with the growth of population, a community must either fight oftener and more vigorously for sufficient land or else be satisfied with

what it had and get food by farming. Fighting was probably much more attractive than working, but fortunately, perhaps, another alternative presented itself. The institution of slavery was rapidly developed. Aliens captured in war, weak and inferior neighbors, criminals and debtors of the tribe were deprived of liberty, compelled to do the drudgery of farm labor and in this way secured for their masters edible grains easily turned into nutritious food by the labor of the women. Slavery in modern times is a curse, but in earlier periods was probably the principal agency whereby humanity passed from pastoral life into agricultural, and was thus the determining factor in the development of the chief source of modern food supplies. Selfish interests and experience soon added improved methods of farming and when tribes came to depend chiefly on the products of the soil for sustenance, the pastoral stage of human existence had passed into the age of agriculture.

Well-marked effects followed this important change. The tribe definitely broke up into clans composed of

Changes in tribal organi- zation.	members closely united through ties of kinship and economic interests. The character of these clans as they settled down into farming village communities became strongly patriarchal. The headship of the clan was vested in the oldest male of the leading family but tended to pass from father to son. Religion secured a powerful hold on the mind by emphasis on ancestral worship. The family became permanent and definite, but included a wider range of kin than the modern family. The entire clan was virtually one great family looking to the head as the Patriarch
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or ruling father who guided and protected his children. They bore a common name, had a common system of worship and cultivated their lands and pastured their herds in common. Their disputes were settled and their affairs regulated by the heads of households in joint session under the leadership of their chief.

In this system each village community was itself a petty state voicing its sovereignty through the chief of the clan who was assisted in his deliberations by the older and more influential men under his authority. Such a community by inter-marriage became closely kindred in blood and in social customs, and thus developed a homogeneous, autonomous, self-centered life that gave wonderful permanence to that form of organization. To this day the larger part of humanity live in agricultural village communities, practically stationary in their civilization and retaining customs and modes of thought having a history of many centuries.¹ Through such communities mankind became trained in manual labor, endurance of toil, reverence and respect for law and authority, tenacity in the maintenance of civil rights and veneration for the supernatural. Without such training civilization could never have attained stability, nor would humanity have developed the homelier virtues and domestic tastes. Its conservatism, however, so necessary in a static civilization, becomes weakness in times of transition and broader development. If unable to adapt itself to newer conditions such a community readily becomes the prey of

¹ For best examples of such, note studies of the village life of China, India and Russia.

stronger, more aggressive communities and falls into a condition of subordination and servitude.

The several village communities, which had once been parts of an original tribe or primitive horde, naturally maintained their connection one with another.

The loose
confedera-
tion.

This intercourse manifested itself in joint worship at stated times, marriage alliances, commercial dealings and joint action for offense and defense in times of war. In this way developed loose confederations which in many cases became more strongly unified through peaceful alliance or through the superiority of a powerful community.¹ From such confederations, by constant social intercourse and intermarriage, aided by ties of kinship and religion, there might easily develop a tribal monarchy like that among the Israelites and the Homeric Greeks. If the conditions that make for civilization were favorable, and able leaders were in charge, such tribal monarchies readily passed into still more unified kingdoms and empires, not strongly centralized as in modern times, but presenting that type so characteristic of oriental monarchies, a sort of confederation or a feudal suzerainty, a unity made up of subordinate units, practically autonomous in local affairs, but yet tributary and in general matters under regulations ordained by the sovereign lord or king.

In such communities as these, whether petty village states or loosely confederated monarchies, were all the necessary elements of the state. Law and authority

¹ An excellent type of such a confederation among American Indians may be found in Morgan's "Ancient Society." A variation in development may be noted in the early history of Rome.

were clearly in evidence; definiteness and permanency in organization had been attained; there were well-

defined ideas of rights and obligations, and a distinct consciousness of political unity. They

The develop-
ing state. differed radically from modern states, however, in that a patriarchal community was a state, family and church in one. These three institutions had not become differentiated in the minds of men. They were all three controlled by the same leaders and might be considered merely three aspects of the same thing, forming a kind of political trinity in unity. Under such conditions the jurisdiction of the state proper did not extend over the other two institutions, unless by a legal fiction it is asserted that "what the sovereign enforces he commands."¹ Toward the end of the patriarchal period the three became differentiated in thought and were looked on as coördinate, each exercising supremacy in its own sphere, and the three united representing the supremacy of the entire community. Then the state became aggressive, through the influences brought about by commerce, and steadily began to encroach on the sphere of parental and ecclesiastical control.

III. The Period of Urban Civilization

A third stage of political life was ushered in through the development of commerce. Even in primitive times a system of barter and trade had developed among different hordes. A brisk traffic was carried on in the exchange of salt, food supplies, ornaments for the dress, paints for the body and jade, flint and metals for tools

¹ For discussion of this point, see Willoughby, p. 169.

and weapons. Between centers producing such forms of wealth and populous centers in need of them, well-beaten paths were made, the humble beginnings of the modern railroad. When wealth multiplied through flocks, herds and agriculture, men's needs multiplied proportionately. Commerce kept pace with the demand. Beasts of burden were trained to the yoke, navigation developed, forms of money as a medium of exchange were devised, and the merchant definitely took his place in civilization. With commerce came the city, that great agent in social development. The reason for the rise of the city is obvious. Certain village communities established themselves in the center of a mining district, or in the heart of fertile lands well suited for grazing or farming. Others, again, at favorable spots on rivers, such as the mouth, a junction or the head of navigation. As trade developed between mining or food centers and masses of population, resting places at regular intervals were established for the convenience of travelers. At all such centers the market place developed and trade was encouraged by the maintenance of peace and order. The termini of trade routes and the best locations between the termini grew into great centers of population. Here gathered the wealth and learning of the time. Here was to be found merchandise of all descriptions. From all parts of the known world came the keenest men of business, travelers of broad experience well versed in foreign customs and ideas, and wise men eager to add to their knowledge. By constant social intercourse and by competition of ideas, the mentality of the population rapidly developed.

The influence of commerce.

Increase of wealth developed new wants, higher learning, broader minds and a more thorough organization of social institutions.

Evidently such a social development demanded changes in political organization. The members of a conservative village community living in practically the same way as their fathers might well continue the customs and habits of their ancestors. But when the population and wealth of the community increased by leaps and bounds, when strangers of wealth and brain capacity settled in ever larger numbers within their borders, modifications had to be made. The village lord became a king, his little council became a great body of advisers and administrators, the petty business of the village became a mass of duties requiring the services of many hundreds. Then followed centralization of authority, codification of customs and the introduction of business methods in administration through the organization of great departments of state. Increasingly larger numbers of influential residents, whether native or foreign by descent, shared in the responsibility of government. Such modifications brought about the development of the city state, best known through the classic examples of Greece and Rome, but found in all early civilizations characterized by a developed commercial life.

A city state, by war or more peaceful means, might extend its influence so as practically to control many smaller cities and large areas of farming, grazing and mining lands. In this way developed another type of ancient monarchy, one much more strongly unified and

centralized than tribal or feudal monarchies, because its several parts, by more frequent intercourse and more vigorous mentality, attained a greater harmony of common interests and a consciousness of national unity. The best illustration of such a development is seen in the Roman empire, which through war extended its boundaries in all directions and then bound together its discordant parts into a harmonious unity through ties of commercial interest, centralized provincial administration and allegiance and submission to a common law and an imperial sovereignty.

Centralized
monarchy.

The downfall of the western Roman empire was a retrograde step in civilization and plunged western Europe back into those stages of political life characterized by village communities and city states. The so-called feudal system represented the movement toward confederation. The rise of the Holy Roman empire, and of the Papacy in its ambition for temporal authority, represented the movement toward the confederation and centralization of empires. The failure of both of these to realize their aims, coupled with the revival of commerce through the influence of the crusades, the invention of the compass and the discovery of America, caused the development of smaller empires or kingdoms, known usually as national states. These national states were commercial in their tendencies, and were strongly unified by definite communal interests, racial, religious and economic. This unity of interests tends to result in a demand for political unity or independent statehood and is usually discussed

National
states.

in political theorizing as the feeling, or the principle of nationality.¹ The formation of national states started once again a forward movement in civilization after a thousand years of seeming inactivity, during which the barbarians of the West were slowly veneering themselves with the polish and civilization of Judea, Greece and Rome. The movements of recent times toward world empire are best illustrated by the Napoleonic period in France and by the imperialistic policies of such states as Russia and Great Britain.

IV. The Period of Industrial Civilization

The last and greatest era in the development of civilization began in earnest when from about the middle of the eighteenth century machinery was definitely applied to the manufacture and transportation of goods and to the production of foods. The really great problem of material civilization is to multiply food supplies and to satisfy the material wants of humanity. Population increases easily and readily under favorable conditions, but food supplies come only by hard work and mental toil. Malthus and his followers have shown the real connection between population and food supplies, holding that, under natural conditions, the former tends to multiply far more rapidly than the latter. Without an abundant supply of wholesome food man cannot do his best work nor develop a high civilization. Every rapid and per-

¹ See p. 76. For brief discussion of nationality, see Willoughby, pp. 120-122. For modern illustrations of demands based on nationality, note home-rule movements of Ireland and Poland.

manent multiplication of food supplies, therefore, furnishes the basis for an increase in human energy and progress. All the great eras of human development have been preceded by a permanent addition to the sources of food supplies. This may be illustrated by the development that came from the use of weapons in hunting, tools and machinery in industrial life and from the utilization of natural forces in production and transportation.

If one traces the wonderful history of human ingenuity in mastering the forces of nature, enslaving them and compelling the energy of the universe to do the will of man, it becomes possible to understand what a powerful stride was taken in development when men for the first time consciously used tools. It was the beginning of civilization, and from the very first its importance was realized. Men die, but their ideas and inventions live after them. Each new acquisition becomes the parent of many others, and each contributes its quota to the multiplication of human possibilities.

From the time when primitive man began to utilize as a weapon a rude club or a clinched stone his development has been marked by a steady advance in invention. The club and the stone united formed the hammer and the ax, the sharpened stick for digging purposes developed into the spade, the hoe and the plow. The edged tool typified by the knife developed from the keen edge of a sharp chip of flint. From such primitive tools have developed slowly, but with rapidly accelerating speed, the numerous forms of tools and weapons used

Import-
tance of the
tool.

to-day in military and industrial life. Each great stage in economic development stimulated men's inventive faculties and enabled them the better to utilize some newly discovered force of nature. Fire was rendered obedient to the human will; wind and water were harnessed for purposes of transportation, the utilization of the force of gravitation gave strength to human muscle; the inventive capacity of the race learned how to control the energy of steam and electricity, and for many ages the knowledge of the possibilities arising from the subjugation of the animal world, and the utilization of the fecundity of nature, has furnished tangible and direct results in the multiplication of food.

Thousands of years lie between the first rude boat in the form of a log, paddled by hand, and the developed ocean liner of to-day. Yet they are alike in that they both utilize natural power for purposes of transportation. The real distinction is quantitative not qualitative. The one transported with difficulty and danger a few pounds at a snail's pace, the other carries swiftly and safely thousands of tons' burden and hundreds of lives. This development in the use of machinery had been slowly going on ever since the human race began, but about the middle of the eighteenth century men apparently had reached their wits' end in productivity. Production by hand and by crude machinery worked by hand or animal labor was not sufficient for the demand. Population was checked through the relative dearth of food and necessities, and commerce could not expand through lack of goods to export. England had immense wealth

Utilization
of the
powers of
nature.

in iron ores and coal, but not even the muscle of the "village blacksmith" could turn goods out cheaply enough and fast enough. At last, in 1769, after men had experimented for at least a hundred years with steam, came Watt's steam engine. In the nineteenth century came the knowledge of the use of electricity, and from these times the inventive ingenuity of the western nations has been devoted to the multiplication of machinery so as to utilize the boundless energy of the universe through control over the power generated by steam and electricity. The significance of all this is, that the productive capacity of the human race in both goods and food supplies is multiplied many thousand-fold, with the advantage that machines, instead of demanding their proportionate share of organic food, are satisfied when fed with fuel. In other words, the productive power of the population is multiplied geometrically but its consumptive power arithmetically. Western nations, therefore, may expand their populations and yet through machinery and commerce multiply food supplies in such abundance as to banish almost from possibility the danger of famine. The inevitable effect of an expansion of material capacity is an expansion of intellectual attainment. Scientific discoveries in chemistry and biology, rendered possible by material development, powerfully aid in the development of food supplies and other material necessities.

As a further result of this development, commerce has multiplied past all precedent, every corner of the habitable earth has become known and explored, hermit nations are forced out for better or for worse into western

civilization, governmental activity has expanded so as to meet new conditions. Larger interests, greater wealth and increased population give greater fighting power, and to the leading nations the old struggle for empire once more comes to the front. They strain every nerve to develop material and mental capacity, so as to attain supremacy in international competition; they seek to expand by extending their sway over nations inferior in attainment, and they readjust their political organizations so as to manage more wisely their great interests. In such an age as this political change is inevitable. World politics finds no place for the petty state, the backward nation, the ultraconservative people. Broad and high intelligence, moral energy, capacity for hard work and bold initiative and invention are the virtues of the age. Intelligence in the state involves democracy in the system; immense resources demand executive and administrative capacity; the necessity of accomplishing a desired end by concentrating every possible ounce of energy at the proper place, insures concentration of governmental power. Such capacities and virtues, in a struggle for national existence or world supremacy, are not matters of indifference but necessities for survival, and hence the present age tends to develop a political life suited to the attainment by states of whatever will contribute to the highest development of their peoples.

The various aspects assumed by the state in the course of its historical development may now be noted in review. In primitive times are to be traced the beginnings of the fundamental ideas involved in the theory

of the modern state; the loosely organized horde represents the nation, and the power wielded by its natural leaders typifies the power of sovereignty in later times. The pastoral stage of the patriarchal period substituted the tribe for the horde, and gave greater definiteness to the organization of the community. The agricultural stage gave the clan or the village community, which slowly developed by conquest and alliance into loosely confederated empires. At the same time the influence of rapidly growing commerce gave birth to the city state, best known in the familiar Greek form, but found also in the medieval cities of Germany and Italy. In the East, in Greece under Alexander, and in Rome, as well as in later Europe, developed the idea of a world empire, the dream and the ambition of every great military leader of all times. This ideal was translated by Christianity into dreams of a spiritual empire in which all the nations of the world would pay allegiance to the Founder of the Faith, and, with the development of the Papacy, to his successor seated in St. Peter's chair at Rome.

The rise of commerce and the consequent differentiation of interests among the peoples of western Europe resulted in the formation of national states held firmly together by ties of common interests and nationality. Intercourse among these gave great impetus to the development of diplomacy, permanent embassies and international law, all designed to aid in the development of economic interests and the maintenance of peace. The discovery of America not only poured mineral wealth into the impoverished kingdoms of Europe, but ushered

Aspects of
the state.

in the great era of colonization in which Spain, Portugal, Holland, France and Great Britain vied with one another in seeking out by exploration all of the unknown world that could be utilized for purposes of commerce and exploitation. A happy combination of circumstances developed in the United States of America the federation, an improved form of confederation, combining in one organization the advantages of autonomous commonwealths with the high centralization of an empire in matters of general policy. This form, so well adapted to the needs of great empires, is rapidly proving its utility as a form of government; indeed, the time may yet come when the smaller states will best secure their autonomy and nationality by uniting in federation with one another and with the larger leading states.

These in brief are the epochs in the development of the state, and if this line of evolution and these types of governmental forms be fixed in mind, the development of any of the historic states of the world can be followed with much greater ease and profit.

SPECIAL REFERENCES

Writers who seek to show that political and social development is largely determined by economic conditions are now numerous. Among these the following are included in the bibliography: BROOKS ADAMS, BUCKLE, CUNNINGHAM, CROZIER, LORIA, PATTEN, ROBERTSON, ROGERS, SELIGMAN, SIDGWICK, and WALLIS.

Slavery: INGRAM, and VEBLER; WARD, "Ancient Lowly."

The Social Importance of Food: RUSSELL, and KIDD.

The Village Community: BADEN-POWELL, GOMME, HOURWICH, MAINE, SEEBOHM, and SIMCOX.

Tribal Organization: GUMMERE, KELLER, MORGAN, and SEEBOHM.

Patriarchal Civilization: FUSTEL, HEARN, KOVALEVSKY, and
SIMCOX.

The City State: BROOKS ADAMS, FOWLER, FUSTEL DE COULANGES,
GREENIDGE, and MUNRO.

Commerce: CLIVE DAY.

PART TWO

THE SOVEREIGNTY OF THE STATE

CHAPTER III

POLITICAL SCIENCE AND SOVEREIGNTY

AFTER this rapid summary of political development, it now becomes possible to study more closely the laws and principles underlying the state and its activities. The branch of knowledge which makes a study of these is known as *Political Science*, which may be defined as the science concerned with the study of the state and of the conditions essential to its existence and development. In other words, the field of political science should include a study of the origin of the state, its nature, its numerous forms of organization, its aims, powers, methods of activity and the conditions that aid or retard its development.

The state is the most important of modern social organizations. It has been and is a mighty factor in civilization. Though in history it has frequently been the instrument of tyranny and despotism, and has often hindered rather than helped humanity, yet it admittedly stands for the highest in human development. For at least twenty-five hundred years the study of this institution has occupied the minds of the wisest philosophers and most thoughtful statesmen, and ancient writings even yet supply the basis for modern political studies.¹ We are at the present time in an era of numerous im-

¹ For example, Aristotle's "Politics."

portant developments in political life; colonization, expansion, federation and democracy are so powerfully affecting the political conditions of the world that the study of political science has become especially important. Most of all is this true in the United States of America, which as a leading state has an important part in the discussion and formulation of world policies.

The subdivisions of political science are numerous and the boundaries of each ill defined. There are in consequence many possible classifications, each determined by the standpoint of the particular writer.¹ If the state be viewed abstractly, we have the branch known as political philosophy or theory, devoting itself to reasonable explanations of the principles underlying political life and development. As in the case of other philosophies, there may also be a history of political theory, a subject rightly receiving much attention at the present time. Another branch of political science devotes itself to the concrete aspect of the state, studying its development, the conditions that aid or retard its prosperity, and its numerous forms of organization and administration. Again, attention may be given to the functions or activities of the state, the theory of these explained, and the practice of various states worked out historically or comparatively. This would lead naturally to the study of law or jurisprudence in all its branches and also to the study of the art of politics, and the methods whereby states formulate their policies and seek to carry them out. Again, states have

Its general
divisions.

¹ As illustrations of classifications, see Willoughby, pp. 4-5, and Pollock, pp. 94-95.

dealings and relationships one with another and have developed a code of international law and the art of diplomacy, both of which branches are of extreme importance in these days of great states and complex interests. Each of these general topics is itself susceptible of numerous subdivisions, but a complete and exhaustive classification falls more properly under political theory, and is not demanded by this study. Enough has been said, however, to call attention to the scope and importance of political science and to indicate, briefly, its general divisions.

It is a branch of the larger study known as social science or sociology. Social science devotes itself to the study of associated man, either by seeking to ascertain the principles and laws underlying human activity or by concrete studies of various forms of social life. The phenomena of social life are closely related and interdependent, but, for convenience, they are regularly classified into groups, and each class or group of phenomena made the subject of special study. In this way are developed such social studies as economics, political science, ethics, comparative religion, education and history.

Evidently all social activity will find expression in some form of human association. Human beings by instinct and habit tend to associate together in communities and the members of these are held together by such permanent and powerful ties as those of common blood, language, customs, religion and economic occupations. In such communities special associations are naturally formed for the purpose of safe-

Its rela-
tion to
sociology.

Definition
of terms.

guarding and developing some particular common interest or set of interests, a tendency especially characteristic of higher civilization. But when a community definitely and permanently becomes organized as a unit for purposes of self-defense and general welfare, then the community is politically organized and may be called a *body politic*.

All bodies politic are not states. Throughout the inhabited world there are numerous bodies politic, large and small, each definitely organized for purposes of common defense and welfare, but most of these are in subordination to similar but larger organizations. Some of these larger organizations are recognized as independent and sovereign, in which case they are known as national bodies politic and are called *states*. The subordinate bodies politic are known by such names as provinces, departments or counties, cities or municipalities and townships or communes. A *state*, therefore, may be defined for theoretical purposes as a sovereign political unity, or, if studied concretely, i. e., through its organization, it may be defined as a national body politic having sovereignty. The term *nation* is applied to the unity spoken of as the national body politic, and the term *people* is applied to the collective mass of inhabitants having domicile within the state, owing it allegiance and entitled to its protection. When emphasis is placed on the fact that the state has authority over its members, these are called *subjects*; if emphasis is on the fact that the members have rights within the state, then the term *citizen* might better be used. In constitutional forms of government male adult citizens, under certain restric-

tions, are given the right to elect by vote officers or representatives, and the collective body of such citizens is known as the *electorate*. This body in popular discussions is regularly assumed to be the exponent or mouthpiece of the people.

Sovereignty

As the state exists in order to safeguard the interests of the community, it must evidently have authority and power to command the services of its subjects. This authority and power is called *sovereignty*, and sovereignty may be defined as the supremacy of the state over the lives and property of its subjects. It is the most essential attribute of the state. There can be no state without sovereignty and every body politic having sovereignty is a state. The word "supremacy" must not be interpreted in the sense of partial supremacy. Sovereignty implies absolute supremacy. A state must be entirely free from the domination of bodies politic external to itself, and must be completely supreme within its own borders. It cannot surrender in whole or in part its sovereignty and remain a state. It may delegate the exercise of one or more of its sovereign powers to bodies politic subordinate, or even external, to itself, if only it reserves the right to recall such delegated power or powers at will. Every political power, therefore, exercised by a subordinate body politic within the jurisdiction of a state, is derived from the sovereignty of the state which may recall it at will.

This supremacy of the state over the lives and property

of its subjects seems to be a dangerous power, and might easily result in despotism and the destruction of personal liberty. Yet after all, the aim of the state is the protection, not the destruction, of life and property; and with all its defects it has measurably succeeded in its purpose. Tendencies toward tyranny can regularly be checked by an intelligent citizen body, who can so arrange the constitution of the state as to make the government a powerful agency in the development of all that is needful and helpful in national prosperity. The state should exercise whatsoever powers seem necessary and expedient for national welfare, provided that, in so doing, it meets with the tacit approval and hearty support of the people. If, in the opinion of the people, it is inexpedient to allow the government to exercise large powers, constitutional restrictions can minimize governmental activity almost to the vanishing point. If, on the other hand, it seems wise to enlarge the powers in exercise, one limitation after another can be removed, until the government may direct and regulate a very large proportion of the powers included under the notion of sovereignty.

Such limitations on the exercise of sovereign powers take the form of bills of rights, constitutional regulations of governmental power and control over officials, effective enough to make them useful agents rather than tyrannical masters of the people. Just as an autocratic king may be so dominated by his ministers as to be a mere puppet in their hands, so a sovereign state may have its governmental organization so wisely regulated by constitutional provisions as to

make it the greatest factor in the development even of individuality.

These regulations or limitations will naturally arise through the expression of an intelligent public opinion. Yet as a matter of fact even in modern democracies the expressed will of the government is only approximately like that of the people, and is frequently very different. Hence the state, voiced by its governmental organs, frequently clashes with public opinion. If this has formal and regular channels¹ through which it may readily influence the government—well and good; but if not, then there is a constitutional system that does not truly represent, and there will inevitably arise, with the growth of intelligence, discord, internal strife and revolutions. This condition is so common even in the present century that much more attention should be devoted on all sides (1) to the development of an intelligent public opinion voicing all the interests of society, and (2) to the perfection of governmental organization so as to allow such public opinion definitely and forcefully to express itself in the formulation of a wise national policy.

The conception of sovereignty as supreme authority over the lives and property of subjects is, then, the most essential principle in the modern theory of the state. It has already been said that when a community definitely organizes itself for self-protection, it thereby becomes a body politic. In early civilization, long before private property developed, communities organized war bands in order to

Develop-
ment of
the idea
of sov-
er-
eignty.

¹ Such as the electorate or a system of political parties enjoying free speech.

make raids against weaker neighbors or to resist inroads on the part of warlike enemies. Such a necessity was ever present in those troublous times, and the duty of fighting for the common safety was incumbent on every member of the community able to bear arms. For this reason the group probably had, in most cases, a military organization, and thereby easily developed ideas of authority, allegiance and responsibility for the general safety.

If communal life was peaceful through abundance of food supplies and absence of aggressive neighbors, similar ideas might readily arise in the regulation of communal customs and property rights, since the notion of general safety would chiefly involve communal rights of food-getting and property as the fundamental condition of life. But the embryonic state, whether fundamentally a war band or an economic group, did not assert its right at that time to regulate religion, private quarrels or individual property rights as these developed. It merely protected general interests in times of offensive or defensive war and left to the family and to similar social institutions the regulation of other forms of social life. As population and wealth increased, and human social relationships became more complex, the state slowly but surely began to extend its jurisdiction over the family, withdrawing by degrees from the control of this institution the regulation of property rights and the safeguarding of life. At the same time, by similar processes, the authority of religious organizations became more and more subordinate to the state.

Through this extension of authority, the power of the

state was greatly enlarged, and a theory of sovereignty as supreme power was slowly developed in order to justify the greater activity of the state. Such a theory of sovereignty may be traced in Athens, in Rome and in Europe after the Renaissance. It was common enough even in medieval academic discussions, but did not become popular until the seventeenth century. The enormous development of wealth and population since that time has caused the general adoption of such a definition of sovereignty for the reason that an efficient regulation of public interests demands a much larger sphere of governmental activity. Older theories in consequence have to be modified to suit the newer conditions. The political theorists of the Reformation, typified by Bodin and Hobbes, and the social contract writers of later times, Locke, for example, brought the matter definitely into discussion, until finally Rousseau, in his "Social Contract," sought to show how a theory of absolute sovereignty might be harmonized with democracy. Ever since that time, the theory has been worked out more carefully in details, and is coming more and more into acceptance. Whether fully accepted or not, all progressive nations assume the theory to be true, and extend governmental jurisdiction over any function whatsoever when public interest seems to demand it. In this way economic, domestic and religious institutions are increasingly passing under the power of the state. Illustrations of this tendency are seen in protective tariffs, banking and currency legislation, in the subordination of the church to the state, in the regulation of inheritances and kinship rights, in civil marriage

and divorce and in the secularization of education and the assumption of it by the state as a public function.

Though the early and the late theories of sovereignty seem so far apart, they can by interpretation be made to harmonize. Sovereignty still implies that the state merely protects life and property, but the difference lies in the meaning assigned to the terms. Protection is not only defense against positive aggression of a hostile foe, but denotes also a parent-like care which shields against every possibility of harm. Not merely the securing of physical existence but also the fostering of mental and spiritual life is within the scope of the state. Property includes not only material wealth, but intangible goods, such as reputation, rights and happiness. Under such broad definitions the protection of life and property has come to mean that the state may do anything expedient, and with such a scope for governmental activity sovereignty can only be defined as absolute power. One may, however, feel sure that in practice the power of the state will be exercised *pari passu* with the utilization of scientific methods and ideas in government, and with the attainment of broad intelligence and sound morality on the part of the people, for the scope of power exercised by a despotic government is in practice very much less than that exercised under constitutional democracies.

Discussions and theories such as these are not merely questions for practice in debate. They are attempts in explanation of the great problems presented on all sides in political life. New conditions of life compel new theories and restatements of older theories. A great

theory clearly explained is a revelation to the men of its day. It shows them the causes and the reason underlying the life of their time, it epitomizes complex phenomena so that the average man may understand, and it is one of the greatest aids to the development of a larger interpretation of civilization. When civilization is practically stationary, political theorizing is merely a formulation of accepted and authoritative beliefs in regard to the existing order of things. But in times of transition or of rapid development there are regularly wide differences in political theories. Furthermore, in former periods the authority of the state was so largely restricted by powers held by family, church and economic group that discussions in regard to the state were relatively unimportant. But when the sovereignty of the state is defined as supreme, widely divergent political theories should be carefully scrutinized so as to obtain a clearer and more scientific explanation of the facts and tendencies of political life.

Such explanations will throw light on the principles involved in the evolution of the state, on the relative importance of the individual and of the community and on the exercise of sovereign powers. They make clearer the value of democratic and aristocratic ideals, and indicate the emphasis that should be placed on moral, educational and economic factors by wise statesmen.

A really wise statesman is more than a skilled politician. He should be as Aristotle says,¹ acquainted with what is best in theory as well as with what is best under given conditions. He should know the history, develop-

¹ "Politics," Book IV, Sec. 1.

ment and purpose of the state, and the best theoretical and the best practicable forms of government. He should also be able, because of his large knowledge of governmental agencies in different parts of the world, to suggest remedies for defects in existing governmental systems.

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CHAPTER IV

ESSENTIAL POWERS OF THE STATE

FROM the consideration of sovereignty itself we may now pass to the application of it in the various aspects of national life, first outlining in a general way the relation of sovereignty to the essential powers of the state.

The authority of the state in respect to the protection of life and property is often discussed under several terms, such as the war power, the police power or the power to preserve the peace of the state (the king's peace). But whatever name may be applied to such manifestations of supremacy, whether exerted in carrying on war, in suppressing riots and rebellion or in checking crime, it is but another name for sovereignty, which is the collective term for whatever power is possessed by the state. Certain aspects of sovereign power, however, are so important in themselves that it is customary to speak of sovereignty as though made up of three essential powers, namely, the police power, including the war power, the power of taxation and the power of eminent domain. By police power is meant the power of the state to do anything needful for the safety and welfare of the nation (*salus populi suprema lex*). The power of taxation implies that the state may take from its subjects the services and property necessary for its support. The

power of eminent domain implies that the state has the right to take from its subjects their lands or property for public use. In all states that have developed along democratic lines these powers are constitutionally safeguarded, so as to secure the people against governmental tyranny; but in practice it is understood that such restrictions are for times of peace. When necessity arises the riot act is read or martial law proclaimed, civil and constitutional guaranties, like *habeas corpus*, are suspended, and the government, in the exercise of the so-called war or police power, takes into its hands the full power of sovereignty on the plea that, *inter arma leges silent*. In well-ordered states, when the crisis is over, the government may be brought to account for the exercise of any unnecessary arbitrariness.

It is easy to see in all this that the so-called police power is merely another name for sovereignty, and that the other so-called essential powers are simply implications arising from that. If the state is to protect the nation from harm evidently it must have the power to raise the means for the performance of this duty. It may do this by demanding the services of its subjects, or by levying a per-capita tax on them, or by taking from them whatever property it needs. All methods are unpopular with subjects, who never pay taxes with cheerfulness or perform forced labor for the state with alacrity. From hard experience the state has gradually learned to compromise with its subjects, and now regularly accepts a financial equivalent for services and an annual payment for the support of the government. But in case of necessity the state does not hesitate to

order its able-bodied subjects into the army or navy or to compel them to assist in the suppression of crime or to labor on public works or in the public service, even without compensation. Nor would it hesitate under similar circumstances to levy forced contributions from the wealthy, nor to appropriate to its own use supplies wherever found, nor to seize any land needed for public use. In other words, the sovereignty of the state implies a virtual ownership of the services, property and land of its subjects, as far as these are necessary for the preservation of the life of the state. The decision as to the necessity of all this lies with the state through its officials, who are restrained by constitutional checks or by the fear of rebellion or revolution.

Forms of Taxation

The power of taxation has become increasingly burdensome with the growth of the scope of governmental activity, since the state in exercising its supervisory and administrative powers has regularly proved to be an expensive necessity, and the burden of taxation has too often been a source of discontent and rebellion. A state best shows its wisdom when it proves able to raise an income that will at once support the government generously and yet not prove burdensome to the people. An efficient system of taxation is one of the highest marks of statesmanship. It is essential, therefore, that one have in mind a brief outline of the numerous forms and methods of taxation used by the state in the course of its development.

Taxation in its early crude forms was naturally suited

to the conditions of savage or barbarian life. As war was the chief and almost only business of the state, its activity was intermittent. Taxation consisted in a demand for the services of its fighting men for war and of other capable members of the community for purposes of advice, defense and maintenance. In time came regulations as to the kind of arms and the amount of food and other supplies each should furnish. If the number of fighting men was in excess of the demand, a system of drafting developed. The state's power of taxation, then, involved its right to enroll or to conscript its able-bodied men for war and to demand suitable arms and supplies. Other governmental expenses, if any, were met by the chiefs or kings themselves, who considered governmental privileges and responsibilities personal perquisites, not a public trust. Offerings, gifts and tribute from subjects and subordinate communities furnished substantial additions to private funds, and special expense might be met by forays on neighboring enemies or by confiscations and seizures. Public lands, also, won by conquest or held in joint possession,¹ often furnished a large source of revenue.

As the state grew in importance, it assumed other functions that involved men's services. Roads and bridges had to be built for war and commercial purposes; public buildings, such as temples, palaces, monuments and fortresses had to be erected; cities founded, irrigating canals dug, public lands cultivated and civic business administered. All these involved taxation,

¹ For example, the *ager publicus* of Rome, the Crown lands of England or the public domain of the United States of America.

and the system employed was similar to that used in war. All able-bodied men might be forced to labor or a district might be required to furnish a quota or a tax might be levied, from the proceeds of which necessary public work would be performed. In earlier systems office-holding, like other services, was compulsory and often involved irksome toil and heavy expense. It is only in modern systems that the emoluments of office cause it to be eagerly sought. As class distinctions developed, taxation became differentiated. The nobility held office, the wealthy paid heavy taxes and the poor performed services.

A definite system of taxation came into use with the rise of private property and the personal ownership of flocks and the products of agriculture. Its first form was the levy of a definite per cent of the produce of the flocks or herds or of the fruits and crops of the land. At a later period the tax on the produce of land was transferred to the land itself. When to this was added a tax on property fixed to the land, e. g., a building, we have the modern idea of real estate as distinct from movable or personal property. Personal services were gradually commuted for other forms of payment and are now rarely demanded except for purposes of war.

In farming communities personal property is naturally small in amount when compared with real property; but the rise of commerce and manufactures, multiplying this form of property, resulted in the development of newer forms of taxation. Besides the direct tax on personal property, always hard to estimate and to collect, came

Taxation
of prop-
erty.

taxes on goods sent out or brought into a country, the modern export and import taxes. Again, a tax might be levied on goods manufactured for the purpose of domestic sale, the excise or internal revenue tax; or on special business transactions, as a stamp tax; or on occupations, a special form of which is the license tax, for permission to enter on a business which from its nature, must be under governmental supervision, such as the sale of liquors, explosives or poisons. A common but obnoxious tax is the poll or head tax. Income and inheritance or legacy taxes have a history of many centuries. They were levied in the classic period and the latter is becoming increasingly popular.¹ Taxes on corporations and on franchise privileges furnish a constantly increasing revenue for the state. In fact the conditions of modern business life are so different from those of former centuries, that national systems of taxation are undergoing rapid changes and are constantly subject to revision so as to suit newer conditions of economic life.

The expense of government is so influenced by the whims and private interests of citizens and office-holders, that it has often proved difficult to balance expenditures with receipts. Then, too, sudden emergencies or unusually expensive public works, might make an unexpected deficit. For this reason in modern states a budget is carefully prepared in ad-

The
budget.

¹ For late (revised) studies of these two forms of taxation, see West, "The Inheritance Tax," 2d ed., 1908, Columbia Series; *American Economic Association Quarterly*, Dec., 1908, Seligman, "Progressive Taxation."

vance, showing possible expenses and estimated receipts and indicating changes needed in taxation so as to avoid too large a deficit or surplus. In less scientific days, in case of special emergency, greater reliance was placed on forced loans, on the confiscation of the property of persons charged with disloyalty, of wealthy corporations like the church, or of unpopular foreigners like wealthy Jews. Fees from petitioners or from litigation furnished a large source of revenue, as also the income from the sale of office, special privileges or monopolies, or from the debasement of the coinage. Under color also of such powers as maintenance, purveyance and eminent domain, or the right of seizure in time of war, large additions to revenue could be made when necessary. All such irregular forms are passing out of use, and seizure of any sort is now regularly accompanied by a fair compensation to the owner.

Aside from the difficulty involved in settling on the kind and subject of taxation, there are inherent difficulties in devising efficient systems of assessment and collection. The old-fashioned system of "farming" or leasing out the privilege of collecting taxes, so productive of tyrannical abuses, and its counterpart in feudal lordships and dues, have been superseded by elaborate schemes of assessment and collection by responsible governmental officials. The ideal of a fair and impartial assessment is exceedingly hard to realize, and in practice the burden of taxation both direct and indirect, is proportionately heavier on the average person of small property and income. Such evils will

Assess-
ment and
collection.

slowly disappear as a more intelligent democracy dictates the policy and administration of government.

Sovereign Powers in Exercise

The state in the exercise of its powers has devoted most of its energy to war and to the maintenance of domestic peace and economic prosperity. Yet as it assumed authority over the family and the church, it deprived these of many powers formerly under their jurisdiction. From the family, for instance, it assumed regulation over such matters as kinship, marriage and inheritance; and it is now gradually assuming many of the functions once exercised by the church, such as education, the administration of charity and the regulation of morality, health, art and amusements. The church itself also has in modern times fallen under the jurisdiction of the state, and its organization, and at times even its theology, is often regulated more or less completely by law.

In order therefore to have in mind the trend of governmental activity, some attention should be given to the development of each of these fields for the exercise of sovereign power.¹

I. The War Power of the State

The original sovereign power of the state is that of war. Even now a state's chief business is to be ready for war and to wage it whenever national safety

¹ Good illustrations of the early functioning of a state may be found in Stubb's "Constitutional History of England," vol. i, and in Gummere (see Bibliography).

or national interests demand it. In modern times diplomacy is becoming increasingly important as a means

whereby dangerous disputes may be adjusted
War and
peace. and treaties for offense and defense negotiated.

In a rude civilization a formal notification of war is not deemed necessary; each state seeks to attack its rival unawares and when the latter is poorly prepared. In more developed states a formal notification is common, though diplomatic negotiations usually supply the information long in advance of the formal proclamation. In theory no state declares war or makes peace without the consent of the dominant interests or classes within the state. In practice this power has to be confided to the head of the state in order that no time may be lost in case of emergency. The head of the state, however, is always in touch with the leaders in national affairs and is advised by them. These dominant interests vary with the economic development of the state. At first they were voiced by the elders and war leaders of the horde, then by the heads of families in early patriarchal times, at a still later stage by the heads of all important clans and families, together with men eminent for past services in war. When commercial states developed, the possession of large wealth, whether personal or landed, gave the owner a voice in council. To the voice of these has been added the will of the people as a whole, made known through their delegates. Rarely would a modern state venture to declare war or make peace without the hearty accord of public opinion formally or informally expressed.

All able-bodied men by theory must serve in the army

or navy. If war is always imminent the theory becomes fact; all men are given a military training and a sufficient number kept in readiness for immediate service. If a state is so situated as not to fear war, it does not enforce military service and depends on volunteers in cases of emergency. Occasionally a small standing army is maintained as a nucleus about which a larger army may be formed. In tribal states petty wars were fought by volunteers who delighted in the excitement of battle; larger wars demanded the services of all the men of the tribe. In the stage of developing confederation or feudalism, each district sent its quota for a common war. In modern times the state keeps a permanent paid army in its service, and supplements the services of these by drafts of men levied from districts in proportion to population.

States in times of stress have used slaves in war, but always under protest, fighting being considered the privilege and the duty of freemen. Convicts and criminals occasionally have been sentenced to serve as a punishment, but this custom is now condemned as derogatory to the service. Occasionally states have hired foreign mercenaries to fight in their wars, but this custom also is no longer favored.

The burden of supplying ships and men for the navy used to fall on seaport communities only; gradually a permanent navy developed, supported by the state and supplemented by privateers and by vessels seized or bought at the outbreak of war. The use of privateers is now practically condemned by all leading nations.

Commercial states using the sea support large navies so as to protect their commerce in case of war.

Positions of command regularly belong in old-fashioned systems to men of the higher social classes, with occasional exceptions in the case of men of decided talent who may rise from the ranks. The present tendency is to make all positions of command open to merit, and this system holds in democratic states. The training of men for war was in early times the duty of the older experienced warriors. At a later period the family and the community respectively trained their members. At the present time the state either directly trains its forces or fixes standards and supervises administrative districts in the performance of this duty. Scientific technical training is also furnished by the state for the officers of the army and navy.

In earlier systems armies subsisted by foraging or plundering along the line of march, each man furnishing his own equipment, according to a set standard. In this case the wealth of a person determined the branch of service he entered; the wealthier served in the cavalry or in the heavy-armed troops, and the poorest as light-armed troops. The expensiveness of modern equipment and the great size of armies compel states to furnish all supplies of weapons, equipment, food, medicines and other necessities. The branch of service entered is determined by skill and choice. The science of war has become so systematized that immense sums are annually expended in the building of military roads and fortifications and in the accumulation of all kinds of military and naval stores. Nat-

urally there is a definite system of rules and regulations which govern the military and naval forces of a nation, but in democratic states these codes are formulated by the lawmaking body so as to render the military subordinate to the civil department of government.

In earlier political life warring communities fought until the one or the other was exterminated or both, from exhaustion, were compelled to desist.

Diplomacy.

Gradually a rude method of negotiation grew up through heralds, whose persons while in the performance of their duties were sacred. Through these, treaties and agreements were made and sanctioned with much ceremony and the taking of oaths. Even in very early times formal treaties were made. One of the earliest extant dates back to the thirteenth century B.C., being a treaty between Rameses II and the Kheta or Hittites.¹ In the middle ages began the custom of sending permanent diplomatic agents to the courts of those nations with which the state had dealings; through these much information was secured of great use to the respective states, and disputes settled without war. Then began consular systems whereby each state sends business agents to the chief business centers of other states, usually seaports, and through these secures information of great value for commercial interests. These agents also transact important details of administrative business for travelers and traders.

The last important development has been the employment of Boards of Arbitration, Joint Commissions, In-

¹ "Records of the Past." First Series, vol. iv, pp. 25-32.

ternational Congresses and The Hague Tribunal. These consider such matters as may be referred to them, hear arguments on all sides and settle amicably disputes that otherwise would frequently end in war.

In western civilization the customs arising from this international intercourse did not attain an important stage until the sixteenth century, when the development of national states and greater intercourse through the development of commerce brought them into prominence. Grotius in his work, "*De jure belli et pacis*"¹ first systematized these customs by commenting on them and supplementing them from principles of Roman and natural law. Since his day many learned treatises on these customs and principles have been set forth, resulting in a fairly well-defined code or set of rules and regulations for the guidance of nations in their intercourse one with the other. These are not law in the sense that they are customs, regulations or commands enforced by a supreme sovereign authority. Though called international law, the term should be understood in the sense that the code is a collection of the customs observed by the greater states in their dealings with one another. No state is legally bound to obey these, but all states for expediency's sake usually conform to them, though they do not hesitate to disregard or alter them in certain particulars if it seems wise.

The early method of disposing of conquered communities was that of devastation. Torture and death were the fate of the males, slavery the lot of the women

¹ First published, 1625.

Inter-
national
law.

and children. At a later stage after a partial slaughter, the remaining members of the conquered community were enslaved and kept permanently in social subordination. A third stage came when the Government of conquered provinces. conquered community was compelled to pay tribute to the conqueror, and to submit to his supremacy in governmental matters, but otherwise was allowed to retain its freedom and peculiar customs.¹ At the present time in wars between civilized states, the conqueror usually imposes on the conquered a heavy tax for war expenses, makes stipulations in regard to the causes of the war and may demand a cession of territory. In the last case there seems to be a tendency for the conqueror to compel such ceded territory to conform more or less completely to the civilization of the successful state, e. g., Poland, Alsace-Lorraine, the Dutch Republics of South Africa, Finland, Porto Rico and the Philippines. This last development is not in harmony with the *principle of nationality* which has obtained in western civilization since the sixteenth century. This principle declares that every race having a civilization and interests peculiar to itself should also have autonomy in government. The attainment of the unity of Italy and Germany in the nineteenth century and the periodic racial troubles in Austro-Hungary and southeast Europe illustrate the principle. The theory of "dominant races" seems to be gaining ground at present. This theory, plainly stated, is that any powerful state may by

¹ See, for example, "Roman System of Provincial Administration," W. T. Arnold, 1879, London. Cæsar's "Wars" furnish many illustrations of early methods.

open conquest or skillful diplomacy subdue weaker and inferior races and states and compel them to assimilate their customs to those of the ruling state. A war for pure aggrandizement probably would not be tolerated by other great powers, but a dominant state seldom lacks an excuse for aggression. A consequence of this theory is that a weaker community which cannot or will not become assimilated disappears. As a rule if the conquered community is equal in quality to the conqueror, assimilation takes place at last, though with much bitterness and rancor. If such a community is inferior in quality, yet such that it can be utilized in economic life, it survives because of its industrial value and may perhaps very slowly amalgamate with the conquering race. If such a community proves to be socially inferior and economically useless, its members slowly disappear, wasted by contact with a superior civilization whose vices and diseases find ready lodgment in a population that has lost its self-respect and its reason for existence. This process of conquest and assimilation, harsh and cruel though it be, has nevertheless been in the past one of the greatest factors in civilization. A race developing only through natural increase tends to lose energy and vitality by inbreeding. Conquest involves more or less intermarriage between the conquerors and the conquered and a slow process of amalgamation takes place. From this crossing of blood and mingling of civilizations a new generation ultimately arises, stronger and wiser than either of its parent stocks. Every important race surviving to-day must in its history have been repeatedly subject

to processes of amalgamation.¹ Peaceful amalgamation is prominent to-day through immigration. The racial safeguard in amalgamation is that a superior race seldom amalgamates with a race much inferior to itself. Extinction not absorption is the ultimate fate of the latter.

The rapid development of international comity in modern times brings into discussion the question of the future probability of a world state, a world federation. It seems undeniable that many centuries hence such a consummation is possible. Development along such lines is already manifest, as illustrated (1) by the growing identity of social and economic interests brought about by constant intercourse through modern inventions, (2) by the development of international law, comity and arbitration, (3) by the development of common administration in such matters as postal service, (4) by the practical supremacy of four or five leading states over the world's territory and (5) by the growing humanitarianism of the age. All these seemingly point to a peaceable amalgamation of the human race under the supremacy of a developing confederation of leading states. On the other hand it is questionable whether these dominant nations will conclude to divide the world's supremacy among them in an amicable manner. These states are economic rivals,

¹ This theory has been best worked out by Ludwig Gumplowicz, "Der Rassenkampf," and "Grundriss der Sociologie." This latter volume has been translated by F. W. Moore, 1899, *Annals*, Phila. Note also article by Mayo-Smith, mentioned in list at end of Chapter I.

and experience shows that economic rivalry is usually settled by war. It may be that the tendencies which make for peace will develop a peaceable federation or the submission of the rest to the hegemony of one, but the probabilities hardly point in that direction. Western civilization is characterized by a fierce, warlike, competitive spirit that brooks no rivals in a contest for economic supremacy. The most peaceable classes in any community are those engaged in religious and in commercial life, but they regularly and heartily favor every war for supremacy. The cost of war, the growing humanitarianism of the age and the enormous loss of life involved in modern struggles are deterrent factors, but these sink away when the lust for gain and warring seizes by contagion an entire nation.

Again, a world state or federation would be strong only as its subjects were homogeneous in civilization and fairly well amalgamated in blood. When one reflects that by far the larger part of humanity live under backward civilizations and in tropical or semitropical lands, it becomes evident that amalgamation by blood would demand thousands of years not centuries, and that a mingling of such dissimilar civilizations is hardly possible. If, however, dominant states should hold such populations in subjection, as England, for example, does India, and develop them in civilization as rapidly as possible, a firm and lasting unity might be secured that ultimately would become democratic. It may be that the future has some such solution in store for humanity. If so, then the dream of many utopians may be realized, and humanity guided by a world policy

may systematically utilize social agencies for the highest possible development of the human race. Indications along such lines will be much clearer by the end of the twentieth century, for civilization having passed round the world is centering its energies in the western hemisphere and in the far East. The lands bordering on the Pacific will grow in importance during this century, and by the end of it the dense populations of China and India will probably have found their place in the politics of the modern world.

II. The Preservation of Domestic Peace

As the primary function of the state is the protection of the lives and property of the community through war, it is not strange that a similar function in internal affairs should develop. State authority in such matters, however, grew much more slowly. Long before the state existed men had protected themselves and still felt abundantly able to do so in ordinary emergencies. In all civilizations, groups of men are found united in bonds of real or fictitious kinship for purposes of joint protection.¹ How instinctive this has become is seen at a glance by observing the numerous fraternal orders of developed civilization. These groups in early civilization were united for purposes of blood revenge, fine payments and mutual responsibility. The patriarchal family at a later stage answered the same purpose. The loosening of patriarchal family ties through commerce and industry brought about in city life the

¹ For illustrations, see Hutton Webster, "Primitive Secret Societies," 1908.

development of the guild,¹ the guild for social and religious purposes, the trades guild, the merchant guild, and akin to these the orders of knighthood and the brotherhoods of the church. Such associations, found in all civilizations and in all times and places, devoted themselves to the preservation of the peace by restraints placed on individual members, by discipline inflicted on disturbers of the peace, and by presenting a united front against aggressions of unruly members of the community.

But besides associations for the preservation of the peace there were others organized for opposite purposes, associations composed of outlaws, robbers, criminals who had fled from home, men owning no master, worthless fellows for whom no one would be responsible.² Against such the united strength of the entire community was necessary. The state therefore developed the function of unifying the force of the community against armed associations of lawless men within its own borders. Similarly, armed resistance to the laws of the community in the form of rebellions, insurrections and riots, was suppressed through the power and strength of the state. In this way developed the right of the state to suppress such disturbances with a strong hand, if necessary suspending civil law for the time and exercising arbitrary war powers.

Ordinary breaches of the peace long remained outside

¹ For special studies of guilds, see articles, *Yale Review*, vol. i, pp. 200 and 275, F. W. Williams, "Chinese and Mediæval Gilds," and vol. vii, pp. 24 and 197, W. E. Hopkins, "Ancient and Modern Hindu Gilds."

² See e. g., *The Cave of Adullam*, I Samuel xxii, 2.

the jurisdiction of the state, and even now some offenses against the peace are popularly considered matters to be settled personally, such as offenses against honor, chastity, reputation and the person. This may be illustrated by such survivals of private vengeance as the fisticuff brawl of humble life, the duel of socially higher classes, the use of lynch law administered by outraged individuals or communities, Ku-Klux organizations and the feuds still so common in backward countries or semi-patriarchal communities. Likewise certain social agencies are still accustomed to exercise slight powers of discipline over their membership as, for instance, the family, the school and the church. Another illustration is the system of ostracism practiced in social life against violators of customary rules of etiquette. All such offenses were once legally avenged by the persons offended, supported by the kinsmen of the fraternity or family. If one slew another, the friends of the murdered man slew the murderer or one of his kin. If injury less than life was inflicted, similar injuries were given in retaliation. This *lex talionis*, or principle of eye for eye, tooth for tooth, had one extremely inconvenient consequence: it was likely to develop into a blood feud. Blood feuds kept the whole community in turmoil, besides robbing the state of many of its best fighting men. Under such conditions the state assumed the office of umpire, examined the facts in the case, turned over the guilty person to his prosecutors for punishment and forbade the friends of the convicted person to carry the matter further. These, debarred from the privilege of avenging their kinsman, sought the privilege of redeem-

Breaches of
the peace.

ing his life by payments. Such a compromise in most cases proved eminently satisfactory to all parties. Better pay a fine than lose a friend, and on the other hand a fine received is some compensation for the loss of a friend, and perhaps more satisfactory than blood revenge. The state was also satisfied, because men that kill in fight make good soldiers in war, and war material of that sort was too valuable to waste through useless bloodshedding.

In some such way developed a system of fines graded for almost every possible offense against the person, from a life to a tooth or a lock of hair, and varying in amount with the social standing of the person assaulted.¹ These fines were paid to the injured person, or to his kin or fraternity, but the state reserved a fraction of the fine for its services as umpire. The income from such fines proved so remunerative to the state, that there was a constant tendency to usurp the function of the prosecutor, whose business it was to present the criminal for trial, and to claim an increasing share of the fines. The matter was settled at last by the state's assumption of the entire matter. When a crime takes place, the state arrests the accused, makes all investigations, prosecutes the case, inflicts the punishment and collects the whole of the fine. The early pecuniary motive of the state has however overreached itself, for, in the development of punitive law, other forms of punishment, such as imprisonment, have been

¹ For a good illustration of such a system, see John M. Stearns, "Germes and Development of the Laws of England," 1889, New York.

substituted for fines in many offenses, and the income of the state has correspondingly diminished, while the expense of administering punishment has enormously increased. Neither the injured person nor his kin now share in the fine but merely have the doubtful satisfaction of seeing punishment inflicted on the offender. By theory a civil process for damages is possible, but in practice, useless. There are movements in some countries looking to the enactment of a law requiring the state to indemnify the injured person or his kin, on the theory that the state agrees to preserve the peace, and if it fails to do so in any case, it should pay a penalty for its neglect.¹

The state in the development of its functions of arbitration and punishment, has tried many curious experiments. The city of refuge represents an attempt to distinguish between intentional and unintentional murder. The use of the sanctuary is a device for the prevention of punishment inflicted without proper consideration. The ordeal and the judicial combat endeavored to throw the responsibility of the decision on God. The system of compurgation allowed the state to decide prudently on the side that could present more able-bodied men ready to swear to anything to help out a friend (a system not unknown at this day). Torture was regularly applied on the theory that a man in great pain will tell the truth. Finally, excessively cruel and hideous forms of death were inflicted on the guilty under the theory that others would be deterred from similar offenses. Such systems of pun-

Theories of
punish-
ment.

¹ See e. g., Ferri, Chapter III.

ishment now survive only in uncivilized communities, and modern penology is founded on humane principles.

A similar development of state authority took place in respect to offenses against property. For a long period theft was considered to be purely a private matter and was settled by methods of retaliation. The injured party would naturally seek to recover from the offender or his kin more than he had lost, so as to recompense him for his trouble. This brought about bad feeling, fighting and occasional loss of life. As in the case of personal violence, the state at first acted as umpire and settled guilt and damages, taking its share of the latter. It then gradually assumed entire responsibility in the matter, and now merely returns to the robbed person his property if recovered.

The modern state in exercising its jurisdiction over crime of all sorts is not satisfied merely to detect and punish the offender, but seeks to prevent the commission of crime (1) by carefully framing and publishing the penal law, in order that no one may plead as an excuse ignorance of the law, and (2) by the use of a permanent police force, which systematically patrols the community and seeks to prevent disorder and crime. Even more is accomplished in this direction by wise systems of education and economic regulation.

The next development took place when the state undertook to arbitrate in civil disputes. Disagreements in regard to property rights easily lead on to acts of violence. The state, therefore, in maintaining its function of keeper of the peace, gradually assumed juris-

diction over such disputes by compelling the contending parties to plead their causes before its magistrate and to submit to his decision. In such cases, however, the state seldom takes the initiative, and civil actions are still in form disputes between persons, while criminal actions are in form charges made by the state itself against individuals.

Regulation
of civil
disputes.

In this development of governmental authority the process is practically uniform: in primitive life disputes of all sorts are settled by private arrangements of the parties concerned, peaceably or violently, according to circumstances or the nature of the case. Then the state from motives of public policy assumes the office of voluntary umpire; at a later stage it enforces with the power of the state its decisions, and finally it either compels disputants to refer their grievances to its courts, or it assumes the responsibility of personally investigating grievances and prosecuting and punishing offenders.

The
natural
process.

This process may be illustrated by the modern strike.¹ This is in form a private dispute between an employer and his men in regard to the economic policy of the firm or corporation. If the strike should become so important as to threaten violence or serious danger to public interests, the state may suggest the use of a board of arbitration, as was done in the coal strike of 1902. At a later period the state may insist that such disputes be referred to a board of arbitration and, finally, may then

¹ For excellent discussions of the strike, see John Graham Brooks, "The Social Unrest," 1903, and F. J. Stimson, "Handbook to the Labor Law of the United States," 1896.

enforce the decision of the board. In this way in matters still left for private settlement the state may organize, as is so commonly the case, courts or boards of arbitration and conciliation, the use of which may be voluntary at first, but may ultimately be made compulsory as the state extends its jurisdiction over all disputes that threaten to disturb the public peace.

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CHAPTER V

ESSENTIAL POWERS OF THE STATE (Continued)

III. Economic Regulation

It will, of course, be impossible in an elementary study to trace the development of all the power and activity of the state in the regulation and control of economic life. It will be sufficient, perhaps, to indicate in a general way what has been the attitude of the state toward the chief factors in economic progress.

The Ownership of Land

The possession of abundant territory is the foremost economic necessity for a state. From the land human beings derive their chief supply of food and
Based originally on use. without land no permanent state can exist. From the earliest times, therefore, states have had to devote especial attention to the acquisition and defense of territory. Whatever claim a community might have to land depended at first entirely on possession and use. The strong hand, nerved by the necessity of securing a livelihood, was the only form of title deed recognized. What a community needed for hunting, grazing or agricultural purposes it used, defending its right by main strength against intruders. If, at a later time, a community, necessitated by natural increase of

population, found itself restricted in food supplies, it would either increase its boundaries by war on weaker neighbors, sending out colonies of fighting men to win and hold the land, or would abandon its old location and seek a new one. In so doing it made no attempt to sell the old nor to buy the new. It seized whatever territory it needed, exterminating or driving before it the inhabitants of the land. The invasion of Canaan by the Israelites and the migration of the Helvetians as narrated by Cæsar illustrate the process.

Occasionally communities sought to acquire ownership in much more territory than it was possible to utilize. This might be due to forethought in anticipation of future growth of population or to land hunger, the desire to own land irrespective of its immediate or even prospective utilization.¹ Manifestly such claims could be maintained only through force or in the absence of opposition. The same condition practically obtains at present. States define their boundary lines at times out of all proportion to the possible needs of their populations. But it is fairly well understood in world politics that a state asserting a claim to lands which it cannot possibly use, holds them only as long as it can defend them against other claimants eager to utilize the territory. States in their relations one with another tacitly assume that the capacity to utilize furnishes a fairly good title against ownership without use. As a corollary to this arises the theory that the nation that can best use, has a better right to land than a nation which mis-

¹ See e. g., Cæsar's account of the Suevi, Gallic War, Book IV, Chapter III.

uses, or only partly utilizes, its territory. In all such controversies, however, the decision between the two rival claimants is generally settled by force of arms, not by discussions of ethical standards. Illustrations of such conflicts may be found in our own history in our dealings with the Indians, with Spain and with Mexico.

Under a theory of ownership based on use, evidently no individual in a community could claim any particular portion of land as his own. As a member of the community he shared with his fellows what all collectively had. In other words, he also had the use but not the ownership of land. In tribal states, therefore, one may expect to find that the tribe will claim hunting or grazing grounds as its private possession, and if nomad life is past, may have permanent possession with fairly well-defined borders, but yet its notion of ownership, both individual and communal, is still an ownership based on use. The same statement is practically true of highly developed patriarchal village life in agricultural communities. Village lands as a whole are held by the community, and each recognized member of it is entitled to his share in use, but he may not sell his portion nor dispose of it by will. The shares allotted to the members of the community were not necessarily equal, for the size of the allotment depended somewhat on the social status of the person; the essential point, however, is, that each head of a family was entitled to a share for the use of his family. Naturally, if a family died out, its right of use reverted to the community.

Similar theories of ownership were applied to mines

found in the communal territory. These, also, were held and worked for the common benefit. When navigable waters became important the same theory was applied to them. Members of the community might use the waters as a privilege incident to their citizenship, but ownership was vested in the community, and individual use was subject always to communal regulation.

Communal ownership evidently involved much management and administration on the part of the members of the community. Conflicting claims of persons entitled to a share in use had to be adjudicated, allotments made, customs declared, times for joint plowing and harvesting arranged, defense provided for and complete regulations for the other innumerable details of administration. If the community was founded on conquest, the management was probably vested in the conquering lord, his kinsmen and his immediate followers; if the community represented a peaceable growth from clan organization, then headship would naturally be vested in the heads of families and in their chief or elder. The ruling body held periodical meetings so as to settle such matters as might demand attention. As long as life was simple, agriculture primitive, inventions few and commerce merely local, such a form of communal ownership and management was eminently satisfactory. This is shown by the fact that the system developed throughout almost all the world and survives yet among the larger part of mankind, in the Russian *mir* and in the village communities of India and China.

But in other localities many causes combined to break

down this system. If through contact with a wider environment some men acquired more energy and greater adaptability than others, and these qualities showed themselves in greater capacity in agriculture, such persons would have a natural disinclination to accept neglected holdings at the next allotment. Only a permanent tenure in use would satisfy, and that step developed naturally among flourishing and populous communities. This tendency was strengthened in those communities which had permanent boundaries by the homing instinct, so characteristic of all higher animal life. Men become attached to the place of their birth and prefer the old and the accustomed to the new, even though there may be a theoretical superiority in the latter. For this reason, also, periodical reassignments of land fell into disfavor. A further step leading on toward individual ownership was that of alienation. A family by migration, crime or debt might lose its share in the communal land, or an alien family under certain circumstances might gain a holding after a residence of a set period of years. Again, conflicting claims of kindred, arising, for example, through adoption or a father's personal preference, frequently must have involved transfers of right to land, or a conquered community might be compelled to transfer permanently a large share of its territory to members of the conquering tribes. Such possibilities must have familiarized communities with the thought of an ownership in land that could be alienated, either through communal action or at the wish of the family or its head. In later times emphasis on the personal wish of the head

The rise of
personal
ownership.

of a family, especially when voiced by a formal expression of his will, definitely completed the process. Henceforth a family, through its head, had a claim to ownership in land. It did not simply have the right of permanent tenure, but under certain contingencies it might even alienate its possessions. At a still later period, wherever democracy developed, the family as a legal unity tended to disintegrate. Under such circumstances even individuals of the family might personally hold land in full ownership. This is our present theory of land holding. An individual may own land, use it or not use it at his pleasure, or may lease it or sell it as he prefers. Many argue that this tendency has gone too far, and assert that the community should never allow its citizens, and still less aliens, to hold land from use. Such an argument is based on the fundamental proposition that the use of land is essential to life, and that each person who holds needed land out of use thereby defrauds to that extent his fellows from part of the opportunities of life. Such theories, for example, as socialism and the single tax favor communal ownership of land, each citizen having the right to use, but not to keep from use, an amount of land suited to the necessities of his family or business. Here, again, as in the case of the territorial claims of states, there is a conflict between an ownership based on a legal theory, and an ownership based on an asserted ethical right, the right of any individual to take possession of unused land if needed for his support and welfare.

There are still many survivals in modern society of communal ownership. The theory of Eminent Domain

implies that the state has the primary right to the use of lands as against the claims of private individuals.

Survivals of communal ownership. Again, the waters of the sea-coast, navigable streams and their shores are, with slight exceptions, communal. The same is true in many states of all waste lands, mining and water rights and of unclaimed or abandoned property. The family also still has ownership of all property left by its members who die intestate and divide it among themselves in accordance with rules laid down by law. Finally, the rapidly extending sphere of governmental ownership of natural monopolies seems to imply that land and mines, as essential means of livelihood, may again become communal, not individual, in ownership. The outcome of this clash of rival theories is, of course, still a matter of doubt. Arguments for a tenure based on use are theoretically strong. Land in the possession of the people as a whole is a far stronger guaranty of democracy than its monopolization by the few. In any case no one can safely deny that the permanent prosperity of any state is fundamentally involved in the wisdom or non-wisdom of its system of land tenures.

Food Supplies

When the population of any region tends by natural increase or through immigration to press too closely on its ordinary means of subsistence, states guided by intelligent leaders have been able to multiply food supplies by scientific devices. Such means now regularly form a large part of governmental activity. Even the early oriental states developed vast systems

of drainage and irrigation, and facilitated transportation by the building of roads and canals. Such works are still carried on in all important countries, either directly by the state or under its supervision and control. In this country we see further extensions of the same idea in the efforts of the government to aid the interests of scientific farming by the support of agricultural schools and by experiments in horticulture and stirpiculture. Increasing attention is given to the preservation of our forests and game, to the utilization of arid lands through irrigation and to the development of fisheries, the importance of which as a source of food supply is well shown by the international prominence of the fishing waters of Newfoundland, Alaska and Saghalien. Kidd¹ and other writers point to the time when the tropics will furnish nations of the temperate zones with vast food supplies, and these regions, therefore, will receive larger attention from states as they feel the necessity of multiplying food for their increasing populations.

Colonization

If population multiplies too rapidly and national boundaries cannot be enlarged peaceably or through war, then migration is and has always been the historic remedy. The spread of population from primitive centers has often been traced. The colonizing systems of Phœnicia, Greece and Rome are known to all students of classical history, and the movements of Teutonic population in the early Christian centuries are part of our common knowledge. The invention of the compass,

¹ "The Control of the Tropics."

the circumnavigation of Africa and the discovery of America gave a new impetus to colonization. Portugal and Spain led the way, then Holland, France and England. The policy at first followed was that of exploitation and trade; agricultural settlements came last and were considered least in importance. An era of exploitation as such cannot permanently endure. A firm hold on newly discovered land depends finally on mining, trading and agricultural centers. The mother country protects and aids in developing such centers in return for trade privileges and an acknowledgment of supremacy. Political capacity on the part of the colony in time brings autonomy, either peaceably or by revolution. The utility of colonies is so manifest that every great state eagerly adds to its colonial possessions, searching the world for places in uncivilized or partly civilized lands suited for trading or colonizing purposes. There it establishes a sphere of influence, sends its traders and missionaries and seeks to build up its interests on a permanent basis. The population of the colony multiplies. The civilization of the ancestral home is reproduced in miniature, with such modifications as are compelled by differences in environment. This great colonizing era, which is still young though it has already lasted over four hundred years, is effecting profound changes in political development. The possession of immense areas of fertile land suitable for colonization makes an outlet for a surplus, but enterprising population, fosters commerce and manufactures and strengthens national prestige and power. Tropical areas not suited to settlement are made to furnish valuable material for foods and

manufactures. In consequence, practically all the available parts of the earth have come under the influence of western civilization, and the great nations are expanding their wealth and population in seeking to utilize the respective parts under their sway. The twentieth century is destined to see a mighty expansion of western population into available centers at present thinly populated, and scientific achievement on the part of leading nations will accomplish in a few years for these regions what otherwise would require centuries of time and energy.

Commerce

The next great step in the economic function of the state came with the rise of commerce. As bartering between communities became increasingly frequent with the growth of wants, the community had to develop roads and market places. Traders would not venture where robbery was inevitable. Roads must be reasonably safe, and a place for barter set aside whose neutrality would be guaranteed. Such market places naturally were on the "marks" or boundaries or at the junction of much-traveled paths. Here by custom would gather traders and buyers from many communities, secured against robbery and attack by the custodians of the market place, who would exact their fees in return for the privileges they gave. Such a center readily grew into a trading village, different in kind from the ordinary farming village. Its customs came to be guaranteed by the larger communities and these customs developed into the unwritten or written charters of municipalities of later times. In order to

The
market
place.

facilitate commerce some attention would have to be paid to the building of roads, which might be utilized also for military purposes. Along such roads passed posts or messages sent by merchants or by the state, as the necessity for frequent communications arose with the development of commerce and administration. If such roads terminated in seaport communities, harbor improvements also might be deemed advisable, and these might be made by interested individuals or by the community itself.

As trading became important the necessity for some common medium of exchange constantly grew. It became inconvenient to exchange goods in kind, even though that system had developed to perfection by fixing a customary value on everything tangible, on the exchange list, from a rude tool to a slave. At first some one staple article was selected and all other things were valued in that. Live stock, such as sheep or cattle formed such a medium. When metals were brought into use these came to be valuable media for exchange and were accepted by weight in return for other goods. A great idea came into the business world when responsible communities or merchants began to stamp under seal a guaranteed weight in specified metals.¹ Such coins passed through definite development in respect to shape, edging, impressions and solidity of guaranty, and finally the entire matter of coinage was removed from the hands of individuals and

¹ For such studies note for example, Alexander Del Mar, "History of the Precious Metals," 1880; and "History of Money in Ancient Countries," 1885, George Bell & Sons, London.

communities and centered in the state. The nationalizing of coinage systems and international agreements based on these clearly indicate a high and wide commercial development. In all such cases the metal so stamped is considered to be inherently worth the amount indicated by the stamp. Governments, tempted by the hope of gain or of borrowing money under false pretenses, have stamped as money material not intrinsically worth the amount indicated by the stamp. Such fiat money becomes in effect a note or promise to pay and is of value only in proportion to the ability of the state to give full face value on demand. Illustrations may be found in the debased coinage of medieval days and in token money and paper currency of modern times. Akin to this development is the present power of the state in fixing standard weights and measures.

As long as wealth consists chiefly of goods in kind, the main problems of economic life center in the multiplication of fertile lands and labor; but when through
*The bank.*¹ commerce wealth in the form of money begins to accumulate, a new set of problems arises. Money of course may be kept on hand in hidden places against a time of need, subject only to the danger of robbery, a danger, however, always imminent. It would manifestly be an advantage to the owner if some responsible party in return for the use of the money, would assume charge of it and return it on demand, or use it and pay interest for the privilege. Furthermore, when a merchant wishes

¹ For a brief sketch of ancient banking, see Sidney Dean, editor-in-chief, "History of Banking and Banks," Chapter I, 1884, Pelham Studios, Boston.

to send money to some distant place in payment of goods bought or to be purchased, he can send it under guard to the place indicated, but at heavy expense and at great danger of robbery. He would be greatly advantaged if some wealthier merchant having branches in both places would accept the money in the one place and agree to pay a similar sum in the other place on demand, making a slight charge only for the transaction. From such needs as these developed a system of private banks, which greatly aided the development of commerce through facility of investment and exchange. The failure of such a bank to meet its obligations might, however, prove to be a great hardship to public as well as to private interests. Two governmental policies developed from this possibility, (1) close and efficient regulation of private banks so as to diminish the possibility of loss to innocent individuals and (2) the establishment of national banks, either like the Bank of England or the original United States Bank or like the national banking system of the United States as developed during the last half century. By such regulation of banking interests the government brings stability and confidence into the monetary system of the community.

Along similar principles the state undertakes in highly developed commercial communities to regulate for the public good great business interests like that of insurance and corporations of all sorts, both private and quasi-public. As an additional aid to commerce a modern state establishes a consular service which it places at the service of its citizens who are abroad or engaged in foreign commerce. It negoti-

State reg-
ulation.

ates commercial treaties with other states so as to develop reciprocal commerce, it subsidizes steamship lines, improves harbors, lines the coast with lighthouses and life-saving stations, builds a navy to protect its shipping and seeks to safeguard the lives and property of its citizens in foreign countries.

Manufacturing

In simple primitive communities industrial life was represented by the manufacture of tools, weapons and household implements, and was almost entirely personal, not communal. To be sure the community was interested in the development of tools and weapons and took a lively interest in seeing that each member had his quota, but the making of these was individual, and individual ownership began in notions associated with personal possession of tools, weapons, clothes and ornaments. The manufacture of weapons and ornaments probably fell to the lot of men; tools for primitive industry, weaving and household implements of all sorts were probably invented by women, on whom devolved manual labor and domestic cares.¹ Each patriarchal household was the center of industry, and the comfort of its members depended on the skill and ingenuity all displayed. With the use of metals much more skill in the handling of tools was necessary. Then developed the smith, first of artisans and parent of many smithing trades. It is probable that at first skilled smiths wandered about from village to village, gypsy fashion, preserving the secrets of their trade and sup-

¹ See in Bibliography references under names, Ely, and Mason.

plying the demands for better and more efficient tools and weapons. From this parent trade developed in turn the various crafts of later commercial life, each the center of its peculiar industry, and the membership of each bound together in ties of guild relationship, modeled in organization after the clan. As long as these trade guilds, made up of masters and men, were useful and flexible, the state encouraged them with special privileges and recognition of their peculiar customs or charters. When, however, they became too rigid, and failed to rise to broader commercial life, they were suppressed, and freedom in industrial life was adopted as a policy. Under this modern system, after a long era of suppression, trade organizations once more developed in the form of trade unions and federations of trades and industries. The place of these in the state is gradually being settled by judicial decision and legislation.

Industries in the larger sense received little attention from the state up to recent times. Monopolies might be granted so as to encourage some particular industry, tariffs placed on imports so as to encourage domestic manufactures and patent rights given in order to encourage ingenuity in invention, but these ideas did not become definite scientific governmental policies until the nineteenth century. Now, if a state wishes to develop its own industries it does so by placing tariff duties on all competing goods entering the country. This is virtually an indirect tax on home consumption. If a state wishes to sell to the foreign trade its industrial products, it must reduce duties on those goods that come in exchange for such

The
larger
industries.

exports. Industries also are stimulated by patent laws which grant monopolies in the manufacture and sale of inventions. The ownership of such patents has been one of the greatest agencies in the development of modern capitalism.¹

In all these forms of economic life, the agricultural, commercial and industrial, the state rarely interferes in the regulation of labor. Slavery and its modified form of serfdom were the prevalent forms of labor down to the age of commerce. In the transition from one to the other regulations of labor were increasingly made by the state, but only as it was necessary to define customary law in respect to personal status and property rights. Commercial and industrial life brought about a demand for a powerful umpire to mediate between the wealthy and the agricultural, industrial population. This interference took the form of adjusting the status of the serf and the freedman in the early stage, and in the later stage, of the freeman who was not a landowner, a merchant nor a master craftsman. As long as class distinctions obtain by constitution, such regulation is necessary whenever a change in status takes place. In democracies, where all men by theory are equal, the state cannot legislate for or against any particular class but must treat all alike. While this is true of persons it is not true of occupations. Some occupations are distinctly beneficial to the state, others are harmful or likely to prove so under careless management. It is common for all states to encourage the first

¹ For an excellent series of addresses on patents, see report of "Patent Centennial Celebration," 1892, Washington.

class by carefully safeguarding their interests; and to prohibit socially injurious occupations entirely, such as certain forms of gambling; and to discourage others, such as the liquor traffic, by compelling persons so engaged to submit to stern regulation and heavy license fees.

IV. The Family in its Relation to the State

The "patriarchal theory" of the origin of the state was considered satisfactory down to within a very few years. It assumed an original pair of human beings, multiplying by successive generations into a clan, a union of these into a tribe and a union of tribes into a nation. This theory of late years has been considerably modified. Researches into the origin of the family show that the patriarchal family came quite late in human history and was preceded by a matriarchal stage in which the father played a relatively insignificant part, as the notion of paternity was unknown. The family of that stage is frequently known as the totem or matriarchal family, in which form of family a mother supported her own children, aided by her uterine brothers and maternal uncles. These would rank as fathers (protectors) and grandfathers to the children, who were not related to their natural father nor to his children by other wives.

Members of the same totem did not necessarily live in the same group. Each group might contain parts of several totems. A man passing from group to group would find totem relations in all, and these were bound together by bonds of kinship and common worship. It was not the totem family that developed into the nation but the horde or group

The
matriarchal
family.

Rise of the
patriarchal
family.

that contained parts of numerous totems. As population increased and the struggle for food supplies became keener, hordes held together more firmly for purposes of self-protection. As men came to understand the possibilities in the domestication of animals and in agriculture, there came a demand for slaves and for women as drudges in the household. Marriage by capture and by purchase became common, and wives so obtained were the property of the husband's family.

As a man of importance or prowess might easily have many women as slaves in his household, whose children by theory were all his, it is evident that a patriarchal family meant a family quite different from its predecessor or from the modern monogamous family.

While the patriarchal family was in process of formation, the members of the horde-tribe, composed of several totems, might intermarry and after many generations truly asserting in a general way their kinship and common descent, might proceed to regulate to some extent kinship and property rights. As the tribe broke up into smaller groups which settled down definitely into pastoral and agricultural occupations, such patriarchal groups would grow still more solidified and would grow into a clearly defined kinship group, tracing descent to a common ancestor, and bound together by close ties of blood and common ancestral worship. These groups, again, might fall apart into yet smaller groups as village communal life developed, which in turn would be made up of families approximating somewhat to the modern idea of a natural family.

Several matters deserve repetition in this explanation

Relation of
the horde
to the
state.

of family development. The totem family itself regulated kinship rights, settled disputes and acknowledged bonds of peculiar obligation among its own members. The embryo state, the horde, had no control over the family as such; it controlled only individuals, irrespective of totem, who happened for the time being to be enrolled in the horde. The patriarchal family also regulated its own kinship rights and relationships and was responsible for the conduct of its members. Its fighting men as such were under the authority of the horde-tribe which represented the state.

In this way from the totem family and from the horde developed four distinct unities:

Groups in the community. 1. The tribe, considering its members akin through some remote or fictitious ancestor, and regulating in a general way kinship rights and common worship.

2. The *gens*, a more closely related part of the tribe, having a common ancestor nearer than the joint reputed ancestor of all the *gentes*, and regulating more closely kinship rights and worship of the gentile ancestor.

3. The clan, a part of the *gens*, dating back theoretically for at least four generations and practically identical with the ancient village community.

4. The patriarchal family, consisting of a living head, his slaves, his subordinate kin and his immediate descendants and their offspring.

With these developments agricultural life was in full swing, the authority of the tribe and *gens* was relatively lessening and the village might practically be considered a state, as far as the state may be said to have existed in

those times. In this case the sovereignty of the state is almost the same as the authority of the father, a paternal authority, however, very different from that of a modern family, in that patriarchal power was exerted over a much larger group, composed of many who only by fiction could be considered as related to him. Unions of clans typified by the *gens*, and of *gentes* typified by the tribe, should in this stage be considered as confederations, each union not having in itself sovereignty over its communities, but exercising only such slight powers as custom had placed in its hands.

Obviously, a state in the modern sense could develop only when a village community, or a loose confederation of communities, devoting itself to commerce and industry, became cosmopolitan and translated the authority of the father into the authority of a ruler, still the father of the people, but in much the same conventional way as the millions of Russians call the Czar their Little Father, to distinguish him from the Great Father of all mankind. As this stage of statehood developed, the old patriarchal family slowly passed into the classic form, as a distinction arose between the immediate natural family and the collection of slaves and servitors. The classical notion of patriarchal family in its fully developed form is best illustrated from the *patria potestas* of the Romans. Each head of the family enjoying this power had a voice in the government of the larger community; as a *pater* he was supreme over his own household of wife, children and their descendants, and was lord or *dominus* over his household of slaves and retainers. As the notion of *res*

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the state.

publica developed, private interests became more and more subordinated to the state, which, through a collective body of the most eminent *patres* in the community, gradually extended its authority. This authority took the form of interference in regard to the disposition of family property at the death of its head. It regulated succession, the testament or will, kinship rights and responsibilities and inflicted punishment for debt or crime when public policy seemed to demand it. Increasing emphasis was placed on the rights of the natural as against the artificial family of the patriarchal system, and as humanitarian ideas crept in through the influence of Stoicism and Christianity the status and treatment of slaves were improved.

Though many survivals of the patriarchal system persisted for centuries after the beginning of the Christian era, yet Christian domestic ideals and Germanic customs slowly brought about changes that ushered in the monogamous family of modern times which traces descent through both parents. The church for a time almost supplanted the state in its regulation of the family, and had jurisdiction over marriage and divorce, testaments, kinship, education and morals. The rise of the modern state, brought about by changes in economic conditions and increase of general intelligence, deprived the church of many of its powers and especially freed the family from ecclesiastical control by the state's gradual assumption of those regulative functions formerly exercised by the church. Marriage has become civil, divorce is granted, if at all, by the courts or by lawmaking bodies, kinship rights and the

The
modern
family.

will are regulated by law, education is secular and largely supported by the state, which also acts *in loco parentis* in case of parental neglect, or incompetency or of complete orphanage. In other words, the family once anterior to, and independent of, the state, has gradually become by theory entirely subject to the supremacy of the state, which does not hesitate, when public policy seems to demand it, to regulate the domestic institution as fully and as effectively as it does economic institutions.

V. The Relation of Church and State

The influence of the state in matters religious presents a curious line of development. Any permanent phase of human activity will embody itself in a social institution, and the church is the institution through which religious activity formally expresses itself. In the animistic stage, religion, if that term may be applied to savage notions of the supernatural, centered in totemistic worship. The older men of the totem represented the authority of the church. They regulated totem relationship with its system of rights and obligations, instructed and initiated the youth into the mysteries of the worship, interpreted the meaning of the supernatural and sought as medicine men and conjurers to heal the physical and mental diseases of the people. Such a function contains in germ all that the church strove to become in later ages, and its early importance as a civilizing factor can hardly be overestimated.¹

¹ For an excellent study of this type of society, see Spencer and Gillen, "The Native Tribes of Central Australia," 1899, London.

With the development of patriarchal society totemism disappeared and in its place came ancestor worship.

Ancestor worship. The formal part of worship now became the prerogative of heads of families, so far as ancestral deities were concerned, but side by side with these arose a system of nature worship, partly a matter of common superstition and partly a cult with a definite priesthood. Supplementing these systems were seers, soothsayers and necromancers, who claimed a deeper insight into the divine will and mind than the more formal priesthood. The combined influence of these several priestly classes was overwhelming. The entire life of the community was dominated by them, and men became perforce religious in thought and action.

Influence of the church in patriarchal times. The maturity of the patriarchal system marks the height of this influence. During this period church and state were for all practical purposes one in aim and in spirit. Rulers were themselves priests and exercised priestly functions. Both institutions were conservative, loved stability and taught submission to authority. The church deified the ruler either as himself a god or God's representative, exalted his priestly authority, educated his nobles to obedience, and kept the masses submissive by declaring rebellion to be impious. Consequently, the priesthood became a separate class, a social hierarchy, having large possessions of land, wealth and special privileges, and exercised an authority hardly second to that of the throne itself. Its leaders were the trusted advisers and assistants of the king. It had charge of higher educa-

tion and instructed aspiring youth in medicine, sanitation, the known sciences, statecraft and divine wisdom. It regulated the morals of the people, condemning or approving social customs, and punishing infringements of its standards. It inculcated the virtues of hospitality, charity and kindness toward the lowly. It sanctioned wholesome amusements and participated in them, developing for its own purposes the rhythm of the song and the dance, as well as the stately march of the procession and the use of musical instruments. Its connection with family worship gave it influence there also, and through its conservative attitude and educational power it was able to solidify into a static civilization the slowly developing forces of the patriarchal period.

But this harmony of church and state was sometimes rudely disturbed. The prophetic or inspirational side

Beginnings
of the
separation
of church
and state.

of religion, voiced by the seer and by the religious reformer, was not infrequently in opposition to the *status quo*, and denounced both ruler and priest for their shortcomings. Then, too, as patriarchal states passed into the age of commercialism, the spirit of the newer age fought against the existing system. As intercourse with other countries developed, there came a knowledge of other divinities; worshipers of these resided within the borders of the state, and in many cases the worship itself was encouraged and sanctioned. New influences and broader knowledge tended to destroy unquestioning belief in the older system, and material progress demanded liberalism in state policy. Competition of religious ideas and systems, and philosophizing slowly sapped beliefs in

local gods. Even though the forms of worship survived, confidence in religious teaching and the efficacy of worship disappeared. For the church, as a rule, is slow to adapt its teachings to the changing conditions of the age, its priesthood is a class apart and sees the signs of the times by refracted light. It is inherently conservative and tends to emphasize the permanent and accepted features of life but not to understand the volcanic energy pent up and seeking expression. For such reasons it regularly fails to adapt itself readily to the newer environment, loses its power in consequence and then after slow readjustments tends to regain part of the influence it has lost.

At such crises the truer interests of society may demand that the state supersede the church in many of its activities. The state, in so doing, realizing the authority and prestige of the church over the minds and hearts of men, may continue to allow it large powers and wealth, but by regulation of its organization and teachings makes it a useful ally rather than a rival for supremacy. It may, however, go farther than this; by depriving it of countenance and financial support, it may thereby thrust it into competition with other social institutions dependent for support on popular favor and approval. The period of the Renaissance practically illustrates this. When the theological tendencies of the church became iron bands restrictive of the growing life within, the state burst these asunder, encouraged science and invention, philosophy and secular education and ignored ecclesiastical teachings in respect to charity, crime, insanity, intemperance

Subordina-
tion of the
church to
the state.

and such social ethical questions. It sought to solve these by scientific investigation rather than by theological dogmatism. The result is that the church is no longer looked on as the final authority in such matters, but the state, making use of the teachings of science and sociology, has become an authority in fixing socio-ethical standards.

On the other hand the church in adversity may turn away from the material aspect of ecclesiasticism and catch glimpses of a world mission, a world empire dominated by religious ideals. The inspiration of such an ideal might even carry the church to victory against the state and render its government theocratic. Such struggles of church and state have been common and victory has passed from one to the other. Sometimes as in the struggles of church and state in medieval and modern times, a truce has been declared and the respective powers of each defined, e. g., the *concordats* so common in the history of the Roman Catholic church. Broadly speaking, however, whenever a state passes into commercial-manufacturing life it tends to emancipate itself from sacerdotal authority and to favor a more or less complete separation of church and state. There seem to be four well-defined stages in the accomplishment of this object:

1. The state and church separate in organization, personnel and function, but work in harmony.

2. The state subordinates the church so effectively that it becomes virtually a department of governmental administration, dominated by the ruler and his ministers.

3. The church frees itself from governmental control

Separation
of church
and state.

in spiritual matters, but is financially chiefly supported by the state.

4. The church becomes entirely separate from the state and is no longer supported from public funds.

As already indicated, the church in conflict with the state lost many of its historic functions. As long as it was in sympathy with the state and was supported by it, it mattered little which institution performed social service. But as the two separated and financial support was supplied more sparingly or withdrawn altogether, it became important from the state's standpoint that it, rather than the church, should perform functions so essential to social welfare. Financial weakness also made the church less able to perform her accustomed functions. Slowly but surely, therefore, one power after another passed from the church to the other social institutions or to the state; charity, medicine, amusements, scientific investigation, philosophy, education, domestic regulation and morals. This change has come more fully in some states than in others, but broadly speaking the power of the church tends to confine itself to devotional and spiritual lines only, and other functions pass from its control. The church may still advance theories of disease and healing, or scientific and philosophic speculations, and may seek to regulate amusements, morals, domestic institutions and education, but such religious *dicta* are mere opinions, not authoritative decisions, and must stand if at all by their inherent reasonableness.

The effect of all this is not necessarily to weaken the church. The older organization, it is true, may be sup-

planted by a newer and more progressive one, but this should and does result in a deepening of spirituality and a clearer philosophic insight into the meaning of life. Freed from the entanglements of material power and wealth, it may devote itself to more important matters. It may liberalize its theology, spiritualize its teachings, humanize its ethical ideals and seek to influence men, not as formerly, by emphasis on pains and penalties, but on the beauty of holiness and the ideals of human brotherhood. Experience seems to show that such a church exercises a deeper and truer sway over men's hearts and minds than an ecclesiastical organization wielding what may now be considered as governmental functions.

The church
independ-
ent.

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PART THREE
THE GOVERNMENT

CHAPTER VI

THE ORGANIZATION OF THE STATE

As the state is the nation organized for the protection of life and property, there will evidently be in every state a definite political organization authorized to exercise the sovereign powers of the state. This organization is called the *government*, and may be defined as that organization in which is vested by constitution the right to exercise sovereign powers.

Definition
of govern-
ment.

Classification of Governments

Although every state has a governmental organization, there are wide variations in the kinds of organization in use. Many attempts have been made to classify these forms into a satisfactory system. The Greek classification, usually assigned to Aristotle,¹ is the best known of these. It divides governments into monarchies, aristocracies or democracies, according as the legal exercise of sovereign power is in the hands of one, few or many. This system is, however, obsolete, owing to numerous changes in the forms of government in modern times. It is impossible, for instance, to consider as similar the monarchies of

The Greek
classifica-
tion.

¹ "Politics," Book III, Sec. 7.

Russia, China, Great Britain and Spain, or the republics of France, Mexico, Switzerland and the United States of America. Such a classification does not classify. Furthermore, since the development of modern democracy, the form of government is often radically different from its spirit. Great Britain by theory is an absolute monarchy, but is in fact a representative democracy, and Mexico, which is by theory a democracy, is in fact a close aristocracy. This divergence between theory and fact and the development of newer forms of government since the time of Aristotle, such as systems of popular representation and of federation, make it difficult to devise a satisfactory classification.

For convenience it may be well to classify governments by form, as (1) *unitary* or (2) *federative* (composite). In unitary forms all local bodies political that unitedly make up the national body political, obtain their governmental power directly or indirectly from the national government and are consequently entirely under its control. In federative, or, as some prefer to say, composite forms, the several governmental units that unitedly make up the national body political, have a constitutional right to govern themselves in local matters, and hence to that extent are not under the control of the national government. The numerous federal governments of modern times should be classified under this head. Akin to this federative form of government in which sovereignty inheres in the unity but not in the units, are unities of sovereign states organized for special purposes, such as confederations,

Classifica-
tion by
form.

treaty alliances or even international tribunals or unions, such as The Hague Tribunal for the settlement of international disputes, or the Postal Union for the regulation of postal service throughout the civilized world. Besides this classification by form, governments may be classified as monarchies or as republics, by noting whether the head of the government be hereditary or elective; or, again, as centralized or decentralized, by noting whether the national government exercises a close supervision or control over the administrative systems of local bodies politic, as in France; or a slight, almost nominal, control, as in Switzerland or in the commonwealths of the United States. The English system represents a type intermediate between these two extremes. A government, furthermore, may be called direct or indirect, according as the policy of the state is determined in the main by the electorate itself or by its representatives.

In addition to a system of classification by form, however, there should be a supplementary classification emphasizing the spirit of government. The government may, for example, be characterized as despotic, autocratic or constitutional; as aristocratic or democratic; as conservative, liberal or radical.

If emphasis be placed on the spirit of government, a practical system of classification can be obtained by noting the degree of democratic development in the nation. This may be indicated in several ways: (1) by noting the ratio of the electorate to the whole population. A system of unrestricted manhood suffrage would

Classifica-
tion based
on the
spirit of
govern-
ment.

approximately give one voter to every four and one half persons in the population.¹ As the ratio rises, the government is presumably less democratic. (2). If the government is representative, the basis of representation in the membership of the lawmaking body may be noted. This basis may be hereditary right or a right based on office-holding or a right based on wealth; or localities irrespective of wealth or population may be represented equally; or equal masses of population may form the basis of representation. (3). Possibly the clearest idea of the spirit of government may be had by noting the body that has the legal right to alter at will the fundamental law of the land. Such a body may be called the "legal sovereign,"² and may be composed of the electorate, as in Switzerland, or of a lawmaking body, as in Great Britain; or may be in the hands of an hereditary ruler, as in Russia. Under such a classification the ancient Greek terms might again be found useful, and governments be classified as in spirit monarchical, aristocratic or democratic, according as the power of legal sovereignty is in the hands of one, few or many.

In future years states will probably develop fundamental likenesses through conscious and unconscious assimilation and imitation, and at that time a more satisfactory classification will be possible. Meanwhile, some formal system of classification such as that suggested above, supplemented by terms descriptive of the

¹ In New Zealand with adult suffrage the ratio of voters to population was (1905) 1 to 1.8.

² See Chapter X.

spirit of government will be found satisfactory enough for ordinary purposes.¹

The Federation

The importance of the modern federation as a form of governmental organization makes it worthy of special mention. Confederations have been known from the earliest times, beginning with confederated hordes and tribes and passing on to confederations of village communities, city states and kingdoms.² As a permanent form of political organization, however, the confederation is weak and inefficient. There is no real unity, the parts are practically sovereign, and all act together only at times of great crises. Their many interests are so diverse that a firm and definite policy becomes impossible. Historically confederations end by falling apart into their constituent elements, or come under the control of some dominant member and gradually become unified in sovereignty.

Yet in government there is real need for a form that will allow kindred communities having common interests to retain their individuality and at the same time have a permanent and clearly defined central organization, empowered to manage on its own initiative all general economic interests. This device was developed in the United States of America by changing the old confederation of the Revo-

Contrasted
with con-
federation.

¹ For chapters on classifications, see e. g., Willoughby, Chapter XIII, and Bluntschli, Book VI.

² For a study of Greek confederations, see E. A. Freeman's, "Federal Government."

lution into the present federation. The distinction between these two forms was not clearly perceived at first, but the result of the Civil War settled it for all time. In a confederation the several states composing the unity are individually sovereign, and are merely bound together by a sort of treaty relationship, under the terms of which a joint organization is effected for the performance of specified functions delegated to it. As each state in the union remains sovereign it may legally secede at pleasure, influenced only by the fear of consequences in case it violates obligations existing between itself and the other states of the confederation. In a federation, however, this right of withdrawal is not claimed by the commonwealths in the union, which can only be dissolved by mutual consent. In such a union the sovereignty of the several states merges into the sovereignty of the totality and the commonwealths cease to be international states. They differ, however, in status from provinces or departments in that their autonomy is fully safeguarded by constitution. Furthermore, they are given by constitution a determining voice in the federal government and in the amendment and revision of the national constitution. In a federation, therefore, the unity is permanent and definite, not dissolvable at the whim of one or several of its parts, but only by the united will of all. Its federal government exercises powers that cannot be hindered by individual commonwealths, and that must be altered if at all by united action under the constitution. On the other hand, the commonwealths of the federation exercise sovereign powers in purely local matters without

interference from the federal government, and each has a voice in the settlement of all matters that concern the welfare of the union as a whole.

The advantage of a federation is therefore obvious. By its emphasis on local autonomy it safeguards local interests and allows each commonwealth to govern itself as it pleases, and yet by the establishment of a permanent central government empowered to manage without interference the general interests of the several commonwealths, it allows the development of an immense empire, which can utilize the strength and energy of all the parts for the common defense and general welfare. In this age, when the movement toward the formation of world empires is so marked, a well-organized federation with its dual form of government has a distinct advantage over rival empires. These are unwieldy because of their bulk or mechanical because of the immensity of general and petty interests controlled by a central organization. This fact is becoming increasingly recognized in political theories, and there is in consequence a strong tendency toward the formation of federations. This is especially seen throughout the American continent and in the colonial system of Great Britain.¹

As a federation necessitates a dual form of governmental organization, the three usual departments of government will in consequence be duplicated. Thus

¹ Existing federations of importance are as follows: The United States of America, the United States of Mexico, Argentina, Venezuela, the German Empire, the Swiss Confederation, Austria-Hungary and the British colonial federations of Canada, Australia and that of South Africa now (1909) in process of formation.

in the United States of America the federal government is made up of a president, a congress and a judicial system organized under the supreme court. But the forty-six commonwealths also unitedly represent a coördinate part of government, and this is made up of the governors as executive, the legislatures as lawmaking body and the courts as supreme court in local jurisdiction. The national constitution is not the constitution for the federal government only, but for it and the combined commonwealths alike. The executive for the United States of America, therefore, is made up of the president and governors;¹ the lawmaking body is composed of congress and the legislatures, and the judicial system includes the supreme courts of the commonwealths and the federal government. This may be illustrated by noting that the constitution is amended by the joint action of congress and the legislatures as the lawmaking body for the union as a whole. In popular discussions this fact is often obscured or confused, and the federal department spoken of as synonymous with the United States of America, but a moment's reflection shows that this is a loose use of terms and without legal justification.

Other federations might be used similarly as illustrations. A federal government alone is never the complete government of its state. The commonwealths with their special governments unitedly form a coördi-

¹ From the international standpoint the president only is recognized by foreign states, since the war and treaty powers are in his hands and the commonwealths as such have no international status.

nate part of the government, and the two coördinate parts, federal and local, form the complete government of the state.

The Departments and Functions of Government

In modern states the government is usually divided into three departments: the executive, the judicial and the legislative. Historically, however, the last two are developments from the first, which is fundamental. In governmental systems these divisions are often largely formal and not based on an exact logical separation of the three great governmental functions. The executive department, for instance, may exercise judicial powers through a series of administrative and naval and military courts, or it may formulate law under the name of decrees or ordinances. On the other hand, a lawmaking body, besides judicial powers over its own membership, or over certain classes of governmental officials,¹ may exercise large executive powers by dictating the personnel of executive or administrative organization.² A judicial department, also, by its power to interpret the law of the land, may in effect alter such law by legal fiction or by strained interpretations of the law itself. These several closely related divisions or departments of government unitedly exercise such sovereign powers of the state as may be intrusted to them by constitution. As the exercise of

¹ By impeachment, for instance.

² By dictating the personnel of the cabinet, or legislating in respect to appointments to the civil service. France and Great Britain are typical illustrations.

these powers is the work or function of government, such activities are usually called governmental functions.

For theoretical purposes the functions of government may be divided into five classes, viz., the deliberative, legislative, executive, administrative and judicial. These may be defined as follows: (a) The deliberative function is to determine what is the will of the state. (b) The legislative function is to formulate into law the will of the state. (c) The executive function is to see that the laws of the state are carried out. (d) The administrative function is to carry out the laws of the state. (e) The judicial function is to interpret the law and to adjudicate its remedies and penalties. Each of these functions will now be briefly explained.

(1) In every state there will always be one or more bodies authorized to discuss and settle on a policy, which will represent the desire and will of the state. This function is regularly exercised by the executive through a council in older forms of government, but is shared by the executive and legislative departments in modern states. At present the function of deliberation seems to be passing into the power of special bodies, nominally controlled by the executive or legislative department, or by both, but for all practical purposes separate and distinct. As illustrations may be noted the development of a cabinet, after the English fashion, or of the permanent committees of American lawmaking bodies, whose chairmen virtually form an inner cabinet for the formulation of legislative policy; or even the rise of the con-

stitutional convention,¹ in the commonwealths of the United States, dictating as it does in the constitution a legislative policy binding on the legislature.

(2) This policy, when agreed on, is formulated into a command, either definitely expressed as law or decree or tacitly expressed and made known through actions of governmental officials. Judicial decisions, for example, are in effect formal notifications of what the law of the land is.

(3) The executive function involves the exercise of oversight, coupled with the power to compel obedience to the law. Naturally this function is chiefly confided to the executive, but in part it may also be exercised by the legislative and judicial departments.

(4) In every state there must be numerous bodies of officials set apart for the performance of the work and routine of governmental business. These bodies collectively make up the administration, which is usually placed under the direct authority of the executive but may be more immediately under the control of the lawmaking body. By law the control over judicial administration is regularly placed in the courts. There is a tendency in modern states to differentiate the organization of the administration from the executive department, leaving to this only a general power of supervision.

(5) The judicial function is, of course, chiefly exercised by the judicial department, if one be organized, or otherwise by the executive. But some judicial power is also usually exercised by the executive and legislative departments, even though there is in organization a formal judicial department.

¹ See pages 214, 217-218.

Under modern conditions, therefore, even though in form a government may be organized into one, two or three departments, there will regularly be found distinct bodies of governmental officials respectively performing one or several of the fivefold functions.

Warfare, the primary activity of the state, may be used as a simple illustration of this classification of governmental functions. The head of the army acting for the state in war, first deliberates on a policy or plan of action. The decision when made is announced in the form of a command. The proper officials at once proceed to carry out the details of the plan under the oversight and direction of the head. If a subordinate should disobey orders, he is brought to trial, his disobedience and the extent of his offense are shown and a proper penalty imposed. These fivefold functions are involved in every complete exercise of sovereignty, whether manifested in primitive or in modern times.

One might naturally expect that there would be five distinct departments of government, each authorized to perform one of the five classes of functions; but in practice such a formal separation would be impossible. If the departments of government are traced historically, it will be found that in ancient states all of these functions were exercised by a body of elders or by a king aided by his council. The same body in other words formulated a policy, made it into a decree, carried out its injunctions, supervised the performance of it and settled finally all violations. At later stages of development these various functions separate or differentiate to some extent and are per-

The de-
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formed by different sets of officials. The deliberative function, for instance, may be exercised by a special body of persons who would personally advise the king or executive as his council. This deliberative power may be supplemented by adding the right to formulate its decisions into law (legislation) on approval of the king. Again, the decision of judicial questions may be left to picked men expert in the law, who sit on the king's seat and make decisions in his name. Or, lastly, the management of certain parts of the administration may be transferred to responsible and capable men, who would perform their functions with but slight control or interference on the part of the executive. The modern government in its formal organization usually consists of three great departments: the executive, the judicial and the legislative. But, as already mentioned, in ancient or old-fashioned states there is usually but one department, the executive, which performs all of the functions of government.

Historically this department arises from the body of elders and chiefs found in early primitive associations, such as the horde. These natural leaders guided the affairs of their savage communities, virtually performing the usual functions of modern governments. They knew the customs and announced them authoritatively, they led or chose a leader in war, administered routine business and adjudicated disputes. As the patriarchal stage developed and the horde passed into the tribe, this body of elders came to consist of the heads of families, who represented the wealth and importance of the several domestic groups in

The executive department.

matters of general interest. As bonds of closer unity developed, the head of the leading family began to assume greater prominence; and, as the ancestral head of the entire community, he gradually assumed the responsibility of leadership and oversight, aided by a council made up of the heads of prominent families. As the tribal community grew in wealth and importance with the growth of agriculture and commerce or by means of successful war, this head became a king, ruling by the will of the gods and hereditary right. At a later stage he was himself considered a god, descended from gods, and even in life was worshiped as a divine person. Such a system of government would naturally develop into despotism on the part of the king and abject submissiveness on the part of the people.

Evidently in a state of any wealth and importance, the king even though powerful would have to depend more and more on his council for advice and for the performance of governmental functions.

**Limitations
on royal
power.**

Little by little, to these important officers were, as a matter of fact, delegated large powers in war, in judicial decisions, in religion and in general administration. In great patriarchal states, therefore, the council became a deliberative body, which in the king's name formulated policy, transacted business and rendered decisions in disputed cases. Under such a system the theory of despotism might survive, but the thing itself would be hedged about with restrictions placed on it by the influential classes in charge of the government. Such a monarchy is aristocratic, the real power being exerted by privileged classes of clergy and nobility.

If the middle and commercial classes should develop in importance through increased wealth and intelligence, then these also would have a growing share in government. The older patrician classes would reserve for their members the most important offices and the most intimate connection with the king, but would share with the influential members of the newer class minor offices and would consult them in matters that directly affected their interests. In this development we have all the essentials for modern governmental organization:

Development of administrative and legislative bodies.

(1) There is a king at the head of the state, whose autocratic powers gradually pass to a council made up from patrician classes. This tendency may go so far that the king's power becomes merely nominal, in which case he may be removed altogether and an elected head or heads take his place as in the oligarchical aristocracies of ancient Greece and Rome.

(2) Increase in the business assigned to the council compels a differentiation of work. A specialized form of work, involving much routine and permanent activity, is transferred to the charge of one or several members of the council, and becomes ultimately a department of administration. In this way are separated one after the other such functions as religion, justice, war, finance and taxation. At the same time the council as a whole, or the most influential members of it, remains as a deliberative body having oversight over public interests as a whole. This is the ancestor of the modern cabinet, which in some form or other is found in every government. As the business and activities of the state in-

crease, these several departments of administration grow in number and importance. Each itself differentiates into bureaus or divisions and the whole system becomes a hierarchy of carefully graded offices, a bureaucracy, nominally under the supervision of the head of the state. The principal departments are regularly represented in the council by their most important officers, who thus perform a double function, serving as heads of administration and as advisers to the king or president. In France there is a sharp distinction between the cabinet of ministers in their advisory capacity, and the same persons as a council of ministers serving in an administrative capacity.¹ Practically all continental European states have their administrations separately organized and regulated by a special code of administrative law and a special system of courts.

(3) In times of rapid development there are many changes which involve increased taxation and modifications of existing law. The council by experience learns the wisdom of consulting more and more the most influential persons or interests affected by such changes. Such persons, or their representatives, thus have in connection with the king and council a voice in the determination of new policies or modifications of old ones.² As this system develops, it may evolve into a lawmaking body, as in England, the council forming an upper house or chamber; and representatives of the other interests

¹ See Wilson's "State," p. 226, ed., 1898.

² As modern illustrations, note the use of such bodies in Russia, Turkey and Persia, all developed within the first decade of the twentieth century.

in the state forming a lower house. If progress in wealth and importance continues, this lower house may develop powers so large as virtually to deprive the upper house of its supremacy.¹ In this case the government passes into the hands of the middle classes and a conservative democracy is the result, even though in form the state still remains a monarchy.

This outline of governmental development illustrates in a general way the usual changes resulting from a progressive development from savage communal life down to the modern era with its democracy and growing complexity of political phenomena. Naturally there are many variations in detail in different parts of the world, but in a fundamental way the development outlined will hold true for all states in the line of progress.

As Russia within the last few years has promulgated through the czar its Fundamental Laws,² the essential points of these may be stated as an illustration of a movement from a pure autocracy to a constitutional monarchy. The czar is declared by law to be the supreme autocrat, his authority is ordered by God Himself, and his person is divine and inviolable. His enormously large executive powers including the right to determine foreign policy, to declare war or to conclude peace, are exercised in connection with a council of ministers whom he appoints or removes at pleasure, and one of whom must countersign his orders or decrees. The chairman or president of this

¹ This movement at the present time (1909) is best illustrated by the growing power of lower houses in Germany and in Japan.

² See, in Bibliography, Dodd, "Modern Constitutions," vol. ii, pp. 182-195.

council is directly responsible to him and represents him in the national parliament. He reserves for himself the initiative in legislation in respect to fundamental laws, but shares with a bicameral body meeting annually other legislative powers, reserving, however, the right of veto. Furthermore, he appoints one half the membership of the upper house, the council of the empire, and provides for the election of the other half for a nine-year term by representatives of the great interests of the state, such as the provincial assemblies, the nobility, the church, the universities and bodies representative of industrial interests. The membership of the lower house, the *duma*, is elected for a five-year period by a four-class system, made up of landed proprietors, municipal voters, peasants and laborers, and so arranged as to give a preponderance of votes to the wealthier classes. In addition to this newer organization are (1) the ruling senate and (2) the holy synod; the first having judicial functions chiefly, and the authority to promulgate laws when properly passed by the parliament and approved by the czar, and the second having jurisdiction over the religious affairs of the empire.

In this brief outline we see over against a divinely appointed autocrat, the separation of divisions of governmental powers exercised respectively by a cabinet, a national church, a judicial organization, a lawmaking body and an electorate, the last two representing the latest additions to the governmental organization. Legal sovereignty is still vested in the czar, who also reserves final authority in administration, lawmaking and judicial decisions.

The Separation or Differentiation of Powers

The development of these several divisions of governmental powers has furnished to students of political philosophy two important theories, that of the separation of powers and the check and balance theory. A brief account of these important principles may prove useful.

When all power was centered in the hands of one department there was no need to discuss theories in respect to the separation of powers, but when a differentiation really had taken place, then some explanation was necessary. Aristotle gave us the first formal statement of it when he divided governmental functions into the deliberative, administrative and judicial, lawmaking in the modern sense being almost unknown in his day.¹ His theory was of no practical use under the autocratic Macedonian and Roman empires but was revived during the Renaissance and played some part in the political discussions of that period. In the eighteenth century Montesquieu in his study of the English constitution came to admire that system, and set forth in his "Spirit of Laws" ² the advantages of a separation of the executive, legislative and judicial powers. He argued that in order to secure justice, each set of powers should be placed in the control of a different set of officials, in order that the same officials should not have the power to make and enforce

¹ "Politics," Book IV, Chapter XIV. Bohn's Classical Library Edition.

² Book XI, Chapter VI.

the law, and to punish infractions of it. Rousseau in his "Social Contract" added the important principle that power over the fundamental law should always rest with the people, in order that the government as a whole might not become tyrannical. The theory of separation has become a democratic principle, though its application varies considerably in different states. It is carried out most logically in the American national system, in which the three departments of government are by law coördinate in importance, and each is as independent of the others as is feasible with the unity of government. In other states there is often a formal but not a real separation, in that some one department tends to dominate the others.¹ The commonwealths of the United States of America in their constitutions formally separate the three departments, but by an illogical assignment of powers often fail to separate them in fact.² In New York, for example, the executive has a great deal of control over legislation, while in Rhode Island the assembly controls almost all of the executive functions, and in addition elects the judiciary.

The usual powers held by the three departments, respectively, are as follows:

I. The *executive department* has (1) the power to

¹ Note, for example, the dominance of the lawmaking body in Great Britain and France.

² See, as an example of formal separation, the Massachusetts constitution, Part I, Article XXX.

"In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and

represent the dignity and personality of the state; (2) war powers, including management of the army and navy, and the power of declaring war and making peace; (3) general oversight of the entire organization of the government, involving the right to take the initiative in action in case of sudden emergency; (4) headship over the administration; (5) the power of appointment to all important offices under the state.

The usual
powers of
the three
depart-
ments.

II. The *lawmaking department* has (1) the power to decide what is and what should be the law of the land; (2) the power to determine the amount and kind of taxes to be levied and to control the levying and expenditure of these. Legislative bodies generally share with the executive the power to determine the policy of the state, both domestic and international, and of general oversight over public welfare.

III. The *judicial department* has (1) the power to interpret the law so as to apply its remedies and penalties in all cases submitted to the courts for decision; (2) in the United States of America the courts have the power to decide finally the meaning and authority of the law in all judicial cases that arise, even though such decisions practically involve the nullifying of laws or rules made by the legislative and executive departments.

Manifestly it would be absurd to separate the three usual divisions of government so far as to make each judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

entirely independent of the others. In order to avoid such a chaos of authority and to unify governmental powers, a system of checks and balances has developed in all modern governments, though worked out most carefully in the United States of America.

Checks and balances.¹ The theory of checks and balances goes back to ancient times, since it was fully discussed by Aristotle, Polybius and Cicero some two thousand years ago. The fundamental idea is that in a state there are always diverse interests finding expression in the government, and that no one of these should become so powerful as to have the others completely at its mercy. This thought is applied later in connection with the theory of the separation of powers so as to develop a system whereby each separate division of government might be controlled by, and in return control, the other divisions. In this way each division checks the others if they become tyrannical, and is itself checked by similar powers held by the other divisions. Thus a bill of rights inserted in the fundamental law is a check on possible governmental tyranny against subjects; the power of removal for cause, and of pardon, in the hands of the executive, is a check on vicious judicial decisions. In the same way the veto power checks a legislature, and its power of impeachment may check abuses of power on the part of the executive and the judiciary. In a federal system the constitution generally arranges an elaborate series of checks, so as to safeguard the commonwealths against the

¹ See Montesquieu, "Spirit of Laws," Book XI, Chapter IV; Blackstone's "Commentaries," Book I, Chapter II.

federal government, and the government against the commonwealths.

The theory of the separation of powers has, however, a larger application in modern times than is generally supposed. Government has become much more complex since the eighteenth century announced its interpretation of the theory, and complexity always involves added differentiation.

Attention has already been called to the fact that administration is rapidly differentiating from the executive function. Modern governmental administrative systems with their administrative law, administrative courts and fixed tenure of office are virtually units in themselves and connected in a shadowy sort of way only with the executive. It is a mere matter of time, therefore, before such states as France, for example, will speak of four departments of government, and name as a fourth the administration.

Again, up to the nineteenth century, very few laws were made by lawmaking bodies and the few which were made were fundamental in importance.

The legal sovereign. For the last hundred years, however, law-making bodies, especially in the United States, have assiduously devoted themselves to the annual multiplication of laws mostly in respect to matters of small importance. Unwise and petty legislation is so characteristic of modern legislators that they seldom enjoy public confidence. In consequence, a special law-making body has developed, the Constitutional Convention, authorized in conjunction with the electorate

to make the fundamental law of the written constitution. This has become a most efficient check on legislative incompetency, as the personnel of conventions is regularly high and the law they formulate serves as a check and regulation on statutory legislation. In the United States, therefore, lawmaking has differentiated into two parts: the fundamental law of the written constitution, and statutes or ordinances made by ordinary legislatures and local councils. For this reason it would be entirely proper to speak of another department of government, the *legal sovereign*, and to define the term as "that person or body of persons having the legal right to make, revise or amend the constitution of the state."¹

But this is not all; in the United States of America alone of all states, the supreme courts have final decision as to the meaning of national or local constitutions, so that all laws conflicting with the declared meaning of the constitution are virtually pronounced by the courts to be null and void. As court dockets grow in length, there is a developing tendency to delegate to inferior courts of appeal for final settlement all cases that do not involve an authoritative interpretation of the constitution. The time may not be far distant, therefore, when in the United States that will be practically the sole function of its supreme courts, and this change would make them in essence a department of government separate and distinct from the ordinary judicial system.

There is, however, a most important separation of

¹ See Chapter X.

The supreme court as final interpreter of the constitution.

power in development that regularly escapes the notice of political theorists. One of the most puzzling problems in all political science is to ascertain what writers mean who speak of "ultimate sovereignty," "the location of sovereignty" or "popular sovereignty." As a rule, such writers become confused by trying to harmonize an ethical principle borrowed from natural rights and the social contract theory, to the effect that a people should control sovereign powers, with legal conditions entirely at variance with the principle. Outside of Switzerland it would be hard to show any state of which it can legally be said that the people possess full sovereign powers.

The
electorate.

In place, therefore, of ethical discussion as to whether the people should or should not rule, attention might better be fixed on a neglected department of government, viz., the electorate. The powers of the electorate are as truly governmental as are the powers of the usual three departments. Through the suffrage, it exercises the executive power of appointment, through the use of the initiative and the referendum it may exercise large and important lawmaking powers, and by its right of jury-service it aids the judiciary in the settlement of civil and criminal cases.

If the electorate should include all adult citizens, male and female, and by election appoint all important executive and administrative heads, all lawmakers, and all judges, and should have over these the right of instruction, and of recall; and if it had, as in Oregon, Oklahoma and Switzerland the right of initiative and referendum even in respect to the constitution, then one

might properly say that the electorate voicing the will of the people, had in its hands the sovereign powers of the state. As a matter of fact, electorates, as a rule, have comparatively few powers and are made up of male citizens only, and seldom of all of these. In no legal sense, therefore, can it be asserted that the people are legally sovereign, unless by exception to the rule.¹ If, however, it seems desirable to favor such a form of government, attention must be fixed on the electorate, its membership enlarged by the extension of suffrage and its powers added to by increasing its control over law and administration. If, however, aristocracy is favored rather than democracy, its membership should be reduced and its governmental powers minimized.

If one were to define the term government more exactly, in harmony with this explanation of governmental organization and differentiation, it might be said to be the sum total of those organizations that exercise or may exercise the sovereign powers of the state.

Since all the sovereign powers of the state may be exercised through the following departments, singly or collectively, the government may be thus tabulated:

- 1 The executive, from which is differentiating the
- 2 Administrative.
- 3 The lawmaking department, from which should be distinguished the
- 4 Legal sovereign.

¹ In political ethics, of course, it may be argued that the people have a "right of revolution," but legally there is no such right, and revolutionists are technically rebels.

5 The judicial system, from which is separating (in the United States)

6 A special court for the authoritative interpretation of the written constitution.

7 The electorate, which is steadily increasing its powers at the expense of the three historic departments of government.

Doubtless for many years to come text-books and theorists will continue to discuss the threefold division of governmental organization, but in this age of governmental differentiation it is well-nigh impossible to get a clear understanding of government unless one considers the electorate as a fourth department. Furthermore, much more exactness in theorizing would be attained by separating, mentally at least, the legal sovereign from the other departments of government. The differentiation of administration from the executive is almost an accomplished fact on the continent of Europe. The remaining specialization is peculiar to the United States of America and deserves special attention because of its political importance, for if the supreme court of the federal department ultimately devotes itself only to final interpretations of the constitution, the party affiliations of its bench will become a matter of increasing concern.

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CHAPTER VII

THE EXECUTIVE DEPARTMENT AND ITS POWERS

IF we examine more closely the functions of the so-called executive department, we shall see that broadly speaking there are two distinct sets of functions:

(1) The head of the executive department represents the unity and personality of the state in the conduct of governmental functions, both domestic and international. As the titular head of the state he acts as mouthpiece for the state in its intercourse with its subjects and with the representatives of foreign states. In performing the latter duty he conducts diplomatic negotiations, is in command of the army and navy, declares war, makes peace, negotiates treaties, receives and sends diplomatic embassies and appoints all officials who assist in these duties. As representative of the state in its intercourse with its subjects he from time to time makes announcements of policy, inspects the workings of the governmental system and makes or recommends improvements.

(2) The performance of governmental functions involves a vast mass of administrative machinery, complicated in its mechanism, and expensive and cumbersome in its workings. The head of the executive is also the head of the administration; as such, he appoints its officers, organizes its departments, assigns to each its

respective functions and oversees the working of the entire administration, enforcing, if necessary, his orders and the law of the land by means of the war and police powers placed in his hands. In this way he maintains peace at home and abroad, makes war, suppresses insurrections, if necessary, and supervises the entire workings of government so as to insure the prosperity and development of the state.

Powers so enormous are too onerous and arduous for one man, and hence there have developed numerous devices intended either to lighten his burdens or to check his power. These will be explained in connection with discussions in regard to the development and powers of cabinets and of the judicial and lawmaking departments.

Headship of the State

All states develop in accord with the same laws, but there are variations in development owing to differing conditions. Yet the process is so similar that a type of governmental development can be set forth which is practically identical everywhere. The starting point is the body of older and wiser men found at the head of the group in all early systems of organization. This body may consist of men eligible because of age and consequent wider experience and knowledge; or of heads of smaller groups such as families or war bands; or of men who by natural talent have shown themselves worthy of a place in the council. Among these the oldest or the wisest or the head of the leading group or the most capable leader in battle would naturally gravitate to the headship, whether attained by right of birth, by

free choice or by force. In this council, with its head, we have the beginnings of modern political organization, the development of which will now be indicated.

The head, as already suggested, might attain his supremacy through force. History is filled with records of great leaders who by their ability in war

Rise of
monarchy.

have founded states and dynasties. Under these circumstances it is a natural tendency for such a leader to seek to hand on his power to the members of his own family, an ambition readily suggested by the hereditary rights of the fathers in a patriarchal system. Even if the head of a state were chosen by the free votes of the council, the natural fondness for power inherent in the human heart would tend to develop intrigues for the perpetuation of power in the family. In this way there developed in all kinds of political groups hereditary rule, based on the analogy of the patriarchal system and appropriating from it its notion of divine right and authority. From the council were selected intimate advisers, personal attendants and assistants in the administration of business. As the wealth and power of the state increased, and leadership became kingship, these classes of officials developed definite functions as a court retinue, as an advisory cabinet and as heads of administrative departments. Among these offices came gradations in importance as system and differentiation became necessary. This gave to the cabinet a chief or prime minister. All these offices at the beginning were under the control of the king, who might appoint or remove at pleasure. But the desire

for hereditary power influenced office-holders also. Many of the most important offices became hereditary, resulting in the rise of a class of nobility, holding wealth and office by inherited right, and steadfastly supporting royal power as essential to their own. The rise of the church in importance developed a similar class among the superior priesthood, who also faithfully supported the king in return for his promotion of ecclesiastical interests. This furnishes us the type for an autocratic monarchy, whose head, ruling by hereditary and divine right, was deemed a mouthpiece and vicegerent of the gods, and who might himself become a god at his death. Changes of dynasty might take place, kingship founded on divine right might become a theocracy, the ranks of the nobility and of the priesthood might be recruited from capable men of lower ranks, but whatever the differences in detail, such autocratic monarchies developed in many parts of the world, ruling millions of people and inculcating into men's minds principles of law, order, submissiveness and respect for authority. China, Siam and Persia in the East, and Russia¹ in the West illustrate the existing states of this sort.

Kingship has played so important a part in the political history of the human race that the present tendencies in regard to that office are well worth noting.

Royal power. In early political systems the king was merely *primus inter pares* and exerted an influence proportionate to the strength of his personality and his ability in action. In despotic-autocratic systems he was

¹ See *Yale Review*, vol. xiv, p. 117, "The Secret of Autocracy; the Absolutism of the Czar," A. P. Dennis.

by theory supreme, irrespective of his capacity or personality. In practice, however, there were limitations that often made the king a mere puppet. Etiquette and ceremony, religious requirements, customs and precedents of long standing, all fettered his individuality and repressed his initiative. Again, the necessity of delegating to others the business of the state, and of depending on them or secret service for knowledge of conditions hampered him. The red tape of a bureaucratic system was omnipresent and secret influences were always at work to thwart or to dethrone him. Enervating luxury and sensual temptations were at his command, and it is not at all strange that autocracy tends to be a dreary record of tyranny, misrule, extortion and oppression.

Again, the system conspired to make him ruler in name only, and to transfer the real power to others eager for their own advancement. As a matter of fact, the power actually exerted by an autocratic king is not to be compared with the power exerted by the executive of a modern state. The one exerts power in a spasmodic, spectacular way, but the other, knowing just what he can and cannot constitutionally do, exerts a powerful continuous influence within his sphere that far outweighs the irregular activities of a monarch theoretically autocratic but practically restricted on every hand in matters of importance. The movement, therefore, already outlined, whereby the larger part of the autocratic powers of modern rulers has been transferred to the other departments of government, does not imply that the executive head has really lost power. It means that his authority has been restricted to activ-

Limited by
constitu-
tion.

ity along certain definite lines, but within those bounds he may happen to exercise a totality of powers far in excess of the amount of power exerted by his autocratic predecessors. This is even more true because of the remarkable extension of governmental activity within the last one hundred years. The executive power of the President of the United States of America is an excellent illustration of this principle. He exerts a far wider and more powerful influence than the Czar of Russia, and probably wields more authority than any other executive on earth. Even the King of England, shorn apparently of all his authority, probably exerts a deeper influence over the affairs of the empire than does the czar, who, though by theory autocratic, is yet checked on every side by a powerful bureaucracy and is repressed by constant fear of assassination.

The existing governments of the world well illustrate the various stages of royal authority and headship.

Types of govern- mental headship.	<p>Tribal rule is common among the native races of South America, Africa and northern Asia. Patriarchal authority is well illustrated in the petty principalities of India; divinity in kingship is seen in Japan and China, and to some extent in such states as Russia and Turkey. The empire of Austria-Hungary furnishes a good illustration of autocratic kingship tending toward constitutionalism, Germany illustrates a stage further in this development, and Great Britain has developed constitutional kingship to its fullest extent. When kingship has been superseded by an elective headship, similar variations in power are possible. The President of Mexico is practically an autocrat ruling</p>
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under the forms of a republic,¹ the President of the United States of America, as already indicated, is perhaps the most powerful of modern rulers, yet his powers are delegated and named in the constitution, and he could easily be removed if he tried to become despotic. The President of France, like the English king, is a nominal ruler of few powers, though in form and by intention the office was made powerful; the President of Switzerland is merely the chairman of an executive committee which administers executive functions under the direction of the federal assembly. It is evident that under present conditions the type toward which all modern states seem to be tending is a headship vested in an hereditary monarch or in an elected president, whose powers in either case will be carefully defined by constitution, and hedged about with numerous restrictions aiming to secure responsibility and efficient service in behalf of the citizen body.

The Cabinet

Changes in the executive department of government are clearly illustrated by the three great systems of cabinets existing in modern times. As the business of the state increases in amount and complexity, numerous departments are formed, each devoting itself to some special line of administrative activity. Some of these departments will naturally be more important than others, and the heads of these must frequently consult with the head of the state in

The auto-
cratic type.

¹ Note *Yale Review*, vol. xii, p. 231, R. L. Rowe, "Administrative Centralization in Mexico."

making important decisions. These influential heads form the nucleus about which the king will center his advisory council, formed by adding such persons as seem worthy on account of their wisdom and standing in the community. In such a system as this we have a council, able to give the king both general and special advice, whose members are appointed by him and are responsible only to him. Such a council may divide into sections, in which case the cabinet will be the inner circle that regularly advises the king in the most important affairs of the kingdom. The Russian system of the nineteenth century well illustrates this first type of cabinet government.

In Great Britain the dominant party in the house of commons names its party leader to the king, who must according to precedent appoint him as prime minister.¹ The prime minister then recommends to the king suitable men to head the various departments and selects from these the most important to form a cabinet. This cabinet, led by the prime minister, formulates national, executive and legislative policy and has in charge the general management of the empire. As long as the cabinet can control a majority in the house of commons it remains in power. If defeated on some fundamental question of policy it resigns, a new election takes place and the successful party as before assumes the reins of power.

The third type of cabinet is that of the United States of America. A president, newly elected, receives the resignations of all administrative heads of departments.

¹ Technically, of course, there is no such office.

He then with the approval of the senate fills the vacancies from the ranks of his own party, paying special attention to those departments whose heads will form his cabinet. The president is himself responsible for executive policy and administration; this cabinet therefore meets at his call, discusses such business as he may submit to it, the president then forming his own decisions irrespective of the expressed opinion of the cabinet. The influence of these heads of departments in formulating national policy is negative and is merged in the responsibility of the president. The chief functions of the cabinet officers are in the administration of their great departments, but even in these they are subordinate to the president who may overrule their policies if he so desires. The Russian and the American systems are alike in that the head of the state appoints his cabinet at will and uses these officers as his advisers and assistants. The English and American systems are alike in that executive power is based on popular election and depends for its continuance on the votes of the electorate. In all three systems cabinet officers are heads of departments and hence exercise the double function of leaders in national policy and in administration. In France the cabinet has a double organization corresponding to this double function. Cabinets differ, however, in respect to their power in determining national policy and in respect to the person or body to which they are responsible. The English cabinet is collectively responsible. In secret session the members decide on a common policy, sink their individual opinions and stand or fall unitedly. In Russia and the United States

The
American
type.

of America, cabinet officers are responsible individually and the resignation of one does not affect the resignation of others. The English system with differences in detail is the one prevalent on the continent of Europe and in the great English colonies. Modifications of both the English and American systems are found among the Latin states of America.

Divisions of Administration

As states vary largely in the amount and kind of business to be administered, there is no close uniformity in administrative organization. The council of
Separation
of church
and state. the primitive state, headed by its chief or chiefs, performed as a unit all kinds of governmental business. As the state developed wealth and power, a movement toward specialization and differentiation was inevitable. The most important development of this sort was the slow separation from executive authority of an organization devoted to the observance and maintenance of worship and religious rites. So far has this separation gone, that in a few states religious observances are no longer considered as a part of governmental business. In nearly all existing states, however, the support and encouragement of religion is classed as a state function; but the connection between church and state varies from a close unity as in Turkey or Russia, to an almost nominal connection as in France. The United States of America and the United States of Mexico best illustrate a real separation between these two great institutions.

The development next in importance was the differ-

entiation that developed between the judicial business of the state and its other administrative powers. As the state assumed jurisdiction over violations of the peace of the state and over disputes in regard to the ownership of private property, the work devolving on officials became so onerous, and at the same time was so important in that it affected the lives and property of the entire community, that it was gradually intrusted to special officials. These became expert in the law of the land and trained in the application of the law to the numerous cases of every sort likely to arise among contentious persons in a complex civilization. There developed, therefore, numerous courts exercising widely varying jurisdiction, but at first not coördinated nor especially efficient. The importance of their work was so thoroughly realized that progressive states early developed efficiency in this branch of administration and movements toward democracy have regularly fought for system and justice in judicial administration. Although in practically all states the judicial system is organized apart from the ordinary administrative system, the executive has regularly striven vigorously to control the courts so as to enhance his power. The movement, however, in all democratic countries is toward a separation between the two; the judiciary is freed as much as possible from executive control, and placed more and more under the control of the lawmaking body and the electorate, under the theory that thereby the rights of the people are more fully safeguarded. This formal separation has taken place most fully in English-Ameri-

Separation
of the
judicial
depart-
ment.

can states, but close approximations to such systems may be found in other modern states.

The third great development in differentiation was the gradual separation of a lawmaking body from the council with its deliberative powers. This development will be traced more fully in a later chapter,¹ but the importance of the change may be indicated from two standpoints:

(1) Such lawmaking bodies in their present form aim to voice the will of the people as a whole, and hence represent a democratic tendency. (2) Such bodies have introduced slowly a process of lawmaking hitherto unknown, and the result of the innovation has wonderfully increased the possibility of progress. All ancient law was custom, and customs change slowly. Modern legislation assumes the right to abolish some customs, to alter others and to make new ones, in every case compelling the people to conform to the new law. This device furnishes at least the possibility of progress, even though in actual legislation many laws are so vicious, absurd and conflicting that at times much of legislation becomes a weariness to the soul.

The development of an electorate is in effect a differentiation of the same sort as the foregoing. The movement toward democracy, in seeking ways and means whereby it might check tendencies toward executive tyranny, hit on the happy expedient of bestowing on certain classes of citizens the power to make by election appointments to important offices. In this way the electorate appoints, more or less

Separation
of a law-
making de-
partment.

Separation
of an elec-
torate.²

¹ Chapter IX.

² Chapter X.

completely, according to the strength of democracy in various states, officials to make laws, to have charge of executive functions and to serve on the judiciary as judges or as jury men. In more recent times there has developed a dread of legislative tyranny, and in consequence the electorate is demanding for itself direct rights in lawmaking. This is shown in the growing use of the initiative and referendum ¹ and in popular control over the making of the fundamental law.

The ancient powers of the executive, therefore, once so enormous, have been steadily reduced in scope by

The administrative system. transfers of power to the church, the judiciary, the lawmaking body and the electorate. The

residue of powers is still centered in the executive department, but in place of one great council administering all such powers, there have been formed numerous subordinate departments, unified in the cabinet and under the authority of the head of the state, but differentiated in function. These administrative departments bear different names in different states and are not always separated on quite the same lines. Broadly speaking, however, there will be departments to regulate international relationships, such as war and diplomacy; to administer colonial possessions, if any, and state monopolies such as the postal service, railways, telegraphs and mines, and to regulate important divisions of economic life, such as commerce, agriculture and manufacturing. There will be departments also for the regulation and support of religion, education and administrative judicial business, for the management of

¹ See pages 220-228.

public finance and for the supervision or control of local administration.

Each department in charge of any particular function may itself be specialized and include several subdivisions, such as the American bureaus and divisions. The several departments of administration may be so loosely supervised that each is practically independent of the others and almost without supervision. On the other hand, they may be closely coördinated and strongly centralized under the executive, as in the English cabinet system. The commonwealths of the United States of America furnish the best illustrations of a loosely coördinated, poorly supervised administrative system in state and city organization. Many departments, commissions and boards have been organized with delegated powers, and these conduct their affairs almost without supervision and often with but slight thought of coöperation. There is, however, a strong tendency to centralize these departments and to place them directly under executive control.¹

The management of administrative departments may be in the hands of a board or commission or in single heads. These may hold office for life, for a long or short term or for an indefinite term during good behavior. They may be appointed or elected, either by the electorate directly or indirectly through elected representatives of the people. They may have the power to appoint their subordinates at will, or these may be appointed in accord with definite

Coördina-
tion of ad-
ministra-
tive
divisions.

¹ See "Our State Constitutions," Chapter V, by the author.

rules and regulations, which may include a system of competitive tests and assignment of office on the basis of capacity and merit. These departments, with their numerous officials and clerical forces, unitedly make up what is called the civil service. Narrowness and inefficiency in its management and life tenure in office develop a bureaucracy, characterized by an overemphasis of routine and details, to the neglect of larger interests. Political favoritism in appointments has also proved a fertile source of inefficiency and corruption. The problem of an honest, economic and efficient administration of government is the hardest problem now before political theorists and statesmen.

There are, broadly speaking, two classes of office-holders:

(1) Those who have discretionary powers in the performance of their executive, administrative, legislative and judicial functions, such as the heads of the various important divisions and subdivisions of government and members of law-making bodies.

Office-holders.

(2) Those who have ministerial powers only, performing their duties under definite instruction, such as a clerical or police force, and the minor officers of the army and navy. Besides these there are many persons hired by the government as menials or laborers, but these, not being engaged in governmental business, are not properly classed as officials.

Or, again, office-holders may be classified into those who serve in the army and navy and are subject to special military and naval rules and regulations, and

those engaged in the civil service, that is, all governmental positions other than those in the army and navy. In continental Europe these are subject to a special system of administrative law.

Office-holders may possess their offices by hereditary right or by appointment or election. An hereditary right to an office is based on the theory that every person who has large economic interests at stake should have in his hand sufficient political power to enable him to safeguard his interests. This principle had its rise in the patriarchal period, when land was the chief form of wealth and its chief defense lay in the military strength of its owner. Hence the rise of a class of landed nobility claiming office by hereditary right. As other forms of wealth developed, its possessors sought political power either through the purchase of landed estates or by allying themselves with political leaders who could protect them in their possessions. In modern times, law, backed by the power and authority of the state, seeks to secure to every man equal and exact justice. Under such a system it is unnecessary that the wealthy have special privileges in office-holding, and hereditary right, therefore, tends to fall into disuse. But if the theory of the law is not properly enforced, wealthy classes invariably seek, even by corrupt means if necessary, to control governmental machinery so as to secure their interests. If equal and just law is administered, it makes small difference whether the office-holder be rich or poor, or hold office for life or for a term of years. He is but a mouthpiece of the national will, which aims to secure impartial justice to all its citizens alike.

Tenure of
office.

Officials elected or appointed¹ are alike in that each represents, not his own interests, but the interests of the body that elects or appoints him. Yet under the usual theory of representation, an elected representative is not legally bound to obey instructions given him by his constituency. He may choose to obey them as a matter of expediency, influenced by the hope of reelection, but should he act otherwise, he cannot legally be called to account for his refusal to follow instructions. Thus, in the United States, a member of an electoral college may be instructed to vote for a certain candidate for the presidency, and he is under a moral obligation to do so, yet if, for some reason, satisfactory to himself, he should vote for another candidate, his vote would be legal and by no possibility could be altered.

In the earlier half of our national history the contrary theory was often argued, and the legal right of constituencies to instruct their delegates was occasionally admitted, especially in the southern states. This aspect survives in the notion that delegates to political conventions if instructed must obey instructions. In recent years there is a revival of the "right of recall,"²

¹ The distinction between these two words is, that an official appointed, is appointed always by some other official or body of officials. An official elected is always chosen by the electorate or by some elected body, representative of the electorate. A mayor or a president, for instance, appoints, but a city council or a legislature elects.

² It is being revived, for example, in connection with the Commission system of municipal government. For bibliography and discussion of this right, see Bulletin No. 12, Wisconsin Legislative Reference Department.

so prominent in our revolutionary history, whereby a constituency by a specified vote may cut short the term of office of some officer or delegate whose actions are not meeting with popular approval.

Administrative Districts

When, in historical development, the simple village community grows through confederation into a larger unity, the larger organization does not deprive the smaller ones of their administrative powers; it merely assumes the general functions incident to the larger interests involved. This, of course, may involve some supervision over the smaller organizations. If, at a later stage, through conquest or peaceable confederation, a still larger unity should develop, the same statement would hold true. There would thus be a national unity exercising general national powers, smaller unities exercising general local powers, and still smaller unities exercising purely local powers. All states that have developed some importance will have these three classes of administrative bodies: the national, the local and the intermediate. The names most commonly applied to the lowest division are the town or township and the commune. Within this there may be smaller administrative districts for purposes of convenience merely. The intermediate organization is historically known as the province, in England and the United States of America as the county or shire, and in France at the present time as the department. This division also is frequently subdivided into smaller districts for convenience in administration, in which case

The three
grades.

each subdivision will contain several townships or communes.¹ If these divisions become economically important through commerce, manufactures and population, they are incorporated as municipalities or cities and form a grade by themselves. Townships remain as subdivisions or wards of the city. Subdivisions of any sort are made for purposes of administration in such matters as conscription, education, charity, sanitation, policing and elections.

If a state is made up by the unification of several states, these former states become important administrative areas intermediate between the province and the national area. The commonwealths of federative governments are such, as, for instance, the commonwealths of the United States of America, the cantons of Switzerland and the states of the German empire. Such, also, were the counties in Saxon England, the "hundreds" then representing the intermediate grade. In any developed state, therefore, one may expect to find subordinate to the national area, townships or communes, provinces or counties, and cities. If the state is federative, the commonwealths form an additional grade. Subdivisions of these several grades will be found in larger or smaller number according to convenience in administration.

Naturally and historically these various subdivisions should exercise full local powers, subject only in general matters to the larger area. This is the modern theory of home rule now under discussion in American cities and

¹ See, for instance, the French Arrondissement and Canton, or the Prussian Kreis.

in Ireland, Finland and Poland. As, however, states have developed policies of centralization, they have interpreted their general powers more broadly, and have pressed their authority more and more vigorously on subordinate administrative areas. This has usually been under plea of military necessity or of needed uniformity or of general welfare. As the strength of this tendency varies with conditions, the degree of centralization varies in each particular state according to the dominant theories of militarism, uniformity and general welfare. On the whole, three grades of centralization may be noted:

(1) That in which the subordinate areas or bodies politic are clearly regulated and supervised directly by the national administration through its own officials, as in France.

(2) That in which the subordinate areas are regulated and supervised indirectly by the national administration, as in England, where in many matters a uniform system is adopted, but the administration of it is left to the local administrative bodies.

(3) That in which the subordinate areas practically regulate all their local affairs without much interference from the national administration, as in the relation of Great Britain to its autonomous colonies, and in the United States of America.

No state conforms entirely to any one of these types; the most centralized government may allow large local powers in some matters and the most decentralized may employ large general powers in such affairs as war, diplomacy and taxation. The test is made by the theo-

retical principle on which government acts, irrespective of whether at any particular time it seems expedient to use many or few powers of regulation. Just how much home rule should be left vested in the subordinate divisions is a question of policy, largely to be determined by conditions. There must be taken into account on one side the general intelligence and public spirit of the communities themselves, and on the other the necessity for emphasis on broad general interests as against localism and incompetency. No theory is, in itself, always and everywhere true. Wisdom in rightly interpreting the conditions of the times must guide in settling on a policy of home rule or centralization.

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CHAPTER VIII

THE JUDICIAL DEPARTMENT

THE chief function of the judicial department is to interpret the law and to apply its penalties and remedies in all cases brought before the courts for their decision. This power is fundamental to the successful workings of government, which by nature is coercive and must have authority to enforce by penalty its decisions. Such a power is essentially executive and was originally wielded by the elders or in earlier states, by the king. In modern states judicial authority has differentiated into two great branches, one exercised chiefly by the executive department and the other by a separate department devoted to judicial functions only. This latter department is concerned chiefly with alleged infractions of the law by private persons and with disputes between private persons in regard to property rights. That part of the judicial function residing in the executive department is concerned mainly with the enforcement of discipline in the army and navy, in the civil service and in the settlement of disputes arising under administrative rules.

As law in the primitive state was simply immemorial custom, binding on all persons alike, infractions of it were few and far between. The chief business of the state in those times was war, and the judicial function

of the state probably had its origin in proceedings against those who failed in the customary duties and obligations of war. The procedure in such cases was short and the punishment severe. This original judicial power of the state survives in treason laws and in the power exercised by the executive department through its control over discipline in the army and navy. This power is not exercised arbitrarily in modern states, but in accordance with constitutional or statutory provisions. Under this power courts martial may be authorized to enforce discipline by bringing offenders "to a more exemplary and speedy punishment than the usual forms of law will allow."¹

Another illustration of this judicial power may be observed in times of riot, insurrection or public danger, when the authority of courts martial may supersede the authority of the ordinary courts of the land in respect to cases involving the peace and safety of the state. The exercise of this power is carefully safeguarded in modern states by legal provisions in regard to the time and manner of its exercise, and by holding those who wield this extraordinary power.

A third form of this kind of judicial function is seen in the arbitrary power exercised by courts in maintaining their dignity by punishing violations of judicial orders. This power to punish arbitrarily by fine or imprisonment for "contempt of court" is a real power even at the present day as seen recently in the United States of America in the injunction cases affecting Debs (1895) and

¹ First mutiny act, England, 1689.

Mitchell and Gompers (1908).¹ Historically, of course, the court is merely a department of administration under the king and punishes for contempt of his commands. Lawmaking bodies in a similar way exercise such judicial powers in matters affecting their dignity, privileges or membership. In general it will be observed that monarchies contain many interesting survivals of broad judicial powers that still reside in king and council. Illustrations could be multiplied, but the judicial power exercised by privy council under the English Tudors and by the present house of lords, the descendant of the Saxon witan or the Norman great council, will readily suggest the application.

An extension of this idea of executive judicial power, developed and maintained by the executive so as to strengthen its importance as against a judicial system proper, may be found in those states (for instance, in practically all of the European continental states) that have a separate system of courts, known as administrative courts, for trying cases in which officers of the civil administration are charged with criminal or illegal acts committed in connection with the discharge of their official functions. The idea underlying such a system of courts is that civil officers in the discretionary performance of their public duties may not infrequently have occasion to violate the ordinary law of the land. In such case they should not be tried in the ordinary courts, but by their superior officers, who from their understanding of the situation can

¹ See Stimson, Chapter IX, for discussion of the injunction in labor disputes.

best decide as to the necessities of the case. This theory of official responsibility does not find favor in English-speaking communities, which prefer to make official and private citizens alike responsible to the same law. The practical effect of an administrative system of courts is (1) to develop a simpler procedure and law for officials in respect to their administrative acts, (2) to mingle principles of abstract justice with notions of expediency and (3) to develop a bureaucracy of special privileges in part above and outside of the ordinary law of the land.

As the French system of administrative courts is the model after which other continental states have patterned, a brief statement of its history and importance may be found useful.¹

In the centuries immediately preceding the revolution of 1789, the ordinary judicial bodies, the provincial **French administrative courts.** *parlements*, were not unified into a great national system as were the courts in England, while on the other hand the national administration was rapidly centralizing its powers and adding to them. Naturally, therefore, the administration vigorously resisted attempts on the part of the courts to exercise jurisdiction over the acts of its officials, and began the process of organizing special courts of its own. In the famous Declaration of Rights of 1789, the theory of Montesquieu in respect to the separation of powers was expressly included and emphasized; but in the fol-

¹ For fuller explanations of the French system and numerous references, see Goodnow, "Comp. Adm. Law," vol. ii, chapter vi; and Lowell, "Cont. Parties," vol. i, pp. 47-68. These works also explain the administrative systems of other countries.

lowing year the assembly by law logically interpreted this to mean, in the light of French history, that the courts should never be allowed to interfere with acts of administrative officials done in the performance of their duties. Still, in order to safeguard citizens in their rights, provisions were carefully made for appeals from subordinate to higher administrative authorities. Since that time the place and importance of court, law and procedure have been carefully worked out into the present admirable system of an administrative judiciary.

As at present organized, the center of the entire system, the court of last resort, is the judicial section of the council of state, which body is composed of the ministerial heads of the great departments of administration and of numerous permanent administrative officials of high grade. Below the judicial section of this council are the prefectural councils, each made up of the prefect of the department as nominal president, and of councilors appointed and removed by the president of the republic. Prefects, and in the communes the mayors, serve as judges in certain petty cases. Within the department there are other specialized courts, such as the superior council of public instruction, coördinate with the prefectural council but lacking its importance. These also are of course subordinated to the council of state.

In France a sharp distinction is made between public and private law. As administrative officials in the performance of their official duties administer public law and apply it to cases arising in national administration, they under French theory should be free from the jurisdiction of the ordinary courts, which adjudicate

only on the rights and duties of private individuals.¹ They are, therefore, in fact placed under the authority of the administrative courts, which use a procedure and law different from those of the ordinary system. These courts in rendering their decisions rely chiefly on precedent, based on the interpretation of statutory authority or ordinances issued by the administration. As public policy must be taken into account as well as principles of abstract justice, the courts naturally use a loose interpretation, a flexible procedure and notions of expediency. This is all the more possible since they are not really bound to follow the law too closely, for the reason that the final decision on appeal lies in the council of state, itself an administrative body, and not subject to the general courts using the private law of the land. Still, as there is a large freedom in appeals, an ordinary citizen will, as a rule, obtain a just decision at small expense and with slight delay in the administrative courts. He may, however, not secure exact justice, or even justice at all, if the case assumes a political aspect and governmental policy seems to demand a partisan decision.

This system of law is, of course, at variance with the English-American theory, which subjects every governmental official and his acts to the final jurisdiction of the general courts of the land. Yet there are approximations to the French system in, for example, the series of military and naval courts administering in separate courts a special law and pro-

French
adminis-
trative law.

American
parallels.

¹ By exception to the principle, criminal law, which is properly public law, is for the most part adjudicated by the ordinary courts.

cedure. In some of the departments of administration also, such as, e. g., the department of the treasury in the United States, there are semi-judicial bodies to render decisions on disputed interpretations of law and ordinance. The rise of administrative commissions, national and local, such as commissions in regulation of interstate commerce or of quasi-public corporations holding franchises, authorized to render judicial decisions on matters intrusted to them, is another illustration of the same development. Yet though these are differentiated, they are not separated and given coördinate jurisdiction. They are subject to the law of the land, and their decisions may ultimately be brought for final review before the general courts of law.¹

Judicial power in the law-making body. An illustration of judicial power exercised by a law-making body is seen in the development of the impeachment power. When the English parliament in its earlier years was seeking to make the king's ministers responsible to it, an effective weapon was found in the bill of attainder. This bill simply named the offender, declared him guilty of high crimes and ordered his execution. It was an arbitrary method of removing an obnoxious minister without form of trial and was certainly effectual. At a later stage, as a concession to popular prejudice in favor of a trial, an obnoxious minister would be formally charged by one house with crime, tried by the other and declared guilty as a matter of course. This method

¹ See T. R. Powell, "Conclusiveness of Administrative Determinations in the Federal Government," *Am. Pol. Sc. Review*, August, 1907, pp. 583-607.

also was effective. By the time public sentiment had risen to a height where it demanded a fair trial on impeachment,¹ ministers had been made responsible through elections and the reform of the parliamentary system. Under such conditions impeachment has become practically unnecessary. In the United States of America bills of attainder are forbidden by constitution and though impeachment is authorized, yet such a method of trial is so tedious, cumbersome and barren of results that it has virtually become obsolete. Public opinion, the courts, elections and compulsory resignation from office furnish the usual methods whereby public officials are made responsible in the performance of their duties.

Development of the Judicial Department

These historic judicial powers residing in the executive, and in the legislative as a development from the executive, represent the original judicial powers residing in the primitive government. In those times all other infractions of custom and disputes of all kinds were settled by private vengeance or compromise. As this system of vengeance passed under the jurisdiction of the state, the executive exercised this new judicial power also. But as the burden of administration grew with increasing jurisdiction, it became necessary to separate this judicial business from the ordinary

¹ See article, "The Law of Impeachment," D. Y. Thomas, *Am. Pol. Sc. Review*, May, 1908. The process of seeking to make a ministry responsible to a parliament, or to its lower house, may be illustrated by such movements in Japan and Germany and in the earlier years of the Russian duma.

business of the executive and to delegate it to a separate set of officials, who devoted themselves to the knowledge of the law of the land and the principles of judicial administration. This separation, however, was for a long time largely nominal. Though the distinction in regard to the kind of function was early established, the development of a distinct set of officials devoting themselves to judicial business came much later. The same officials administered executive business as assistants of the king, sat in the council and advised him in matters of national policy, and in case of dispute declared what was in their opinion the law of the land. They would then as judges sit on the king's judgment seat, decide disputes and punish violations of the law. Such a system, however, best suits small states of comparatively simple administration. As civilization becomes complex and as states increase in population and wealth, thereby multiplying personal and property rights, a further differentiation becomes inevitable. Judicial functions pass into the control of a specialized class, who by practice and training become expert in the law.

The next development results from the rise of democracy. Judicial power practically affects the entire population. Any person may at some time or other be charged with a violation of law or be concerned in the settlement of property rights. All, consequently, become interested in having the courts decide justly and honestly cases brought before them. Venal judges and corrupt decisions have always been denounced, and even-handed justice for all men sought as the ideal. For such reasons a developing democracy

Independ-
ence of the
judiciary.

intuitively seeks to control the courts so as to insure greater justice. As it gains power and intelligence it is able to control more fully the organization of the judicial system, the appointments to office and the quality of the law, and to remove one after the other the special privileges of favored classes so as to make all men equal in the eyes of the law (*pares inter pares*). Naturally enough, kings stoutly resisted this developing independence of the judiciary, but in democratic communities they resisted in vain. In such states we find a judiciary and judicial department to all intents and purposes free from the domination of the executive, administering a law approved by representatives of the people, and rendering decisions with impartial purpose and theoretically without distinction of persons. In monarchies the king may still by theory be looked on as the head of the judicial system, but his power is nominal and is exercised chiefly by tempering judicial punishments with mercy through the exercise of the pardoning power, which is still held as an executive prerogative.

The modern theory of law is strongly democratic in that the state aims to treat every man alike before the law. Ancient systems were founded on far different principles. Even in primitive times, when a rude democracy characterized the horde, the elders had special privileges, and women and children were too often considered as having no rights that a man was bound to respect. The caste system of India illustrates the extreme development of special privileges according to social grade. The people are carefully divided into castes, and legal rights are based in accordance

Privileged
classes.

with the quality of the caste. Similar distinctions existed and do yet exist in autocratic or aristocratic monarchies. Special privileges were held by the nobility as the military-governing class, and by the clergy. Below these were freemen, freedmen and aliens, with rights as against one another but with small rights as against the nobility. At the bottom of the scale were slaves, having almost no status nor rights in the eyes of the law. Equality before the law under such a system was impossible. Crimes might be committed with impunity by members of the higher classes that would bring condemnation and severe punishment if committed by members of the lower classes. The testimony of the one far outweighed the testimony of the other. This brought about conflicting ethical standards and degradation of morals. As the influence of the common people developed, they fought vigorously for equality of rights for all freemen, and as slavery disappeared that meant for all men. Slowly the plebeians or commoners won rights and deprived the higher classes of special privileges, until with the full tide of democracy in the nineteenth century the virtual legal equality of man was accepted by many progressive states. There are still class distinctions based on social rank, wealth and birth, but these are rapidly disappearing in judicial matters. As a matter of practice, even in democracies, courts make real distinctions almost unconsciously between the wealthy and the poor, between social leaders and social inferiors, between persons of respectability and responsibility and their opposites. All this is natural enough under the circumstances of modern life; but the

democratic movement is slowly removing in modern states all legal distinctions between man and man, save those based on character and social utility.

The judicial system of any modern state is complex and confusing to the layman, yet there are certain natural lines of development easy to follow

Systems of
courts.

that readily suggest the clew for any given system. In criminal matters there will regularly be three grades of courts. In the first, or lowest, grade there will be found established in every small district of sufficient population a court whose jurisdiction is limited to the summary disposal of petty crimes or misdemeanors or to the commitment of the accused person to the court of next higher grade. This court will have jurisdiction over cases involving serious crimes and severe punishment. The third and highest court will be authorized to try special forms of important crime and to hear appeals from the lower courts. When a final decision is rendered, the only recourse left to the convicted criminal is a petition to the pardoning power, which may, from the standpoint of mercy, modify to some extent the amount of penalty inflicted by the courts. Kings formerly claimed the right to suspend or waive the application of the law in the case of particular persons charged with crime, but such powers are not consistent with a theory of equal justice. In civil cases a threefold classification is also common. There is a local court for petty cases, a court for disputes involving more important property rights and a supreme court for specified classes of important cases and for appeals.

Inequitable decisions finally rendered by the civil

courts formerly might be appealed to the king as the fountain of justice, who would personally remedy the defects of the law by a special decision, or might delegate the power of investigation to a special official or body of officials, who thereby became a court. In this way was developed in England the court of the Lord Chancellor and the system of equity law. In modern times an appeal for remedy in the form of a petition may be sent to the lawmaking body which, as the maker of law, may modify judicial decisions in individual cases, unless restrained by constitutional prohibitions.

The best illustration of the process of introducing equity into custom can be obtained from a study of the development of Roman law. The harsh and crude customs of the early law as codified in the XII Tables were slowly modified by equitable principles introduced by prætor, commentator and emperor, until after a thousand years of constant modification (450 B.C.—Justinian's Codification, 529–534 A.D.) the civil law of Rome stood forth as, possibly, the most valuable contribution of Roman civilization to its modern successors in eastern Asia and Europe.

The comparatively simple judicial organization outlined above may become more complex by the multiplication of administrative functions. Great masses of specialized business may be set apart and handled by special systems of courts patterned in general after the national system. If, for example, church and state be united, there may be a special series of ecclesiastical courts to consider cases

The
system of
equity.

Specialized
jurisdic-
tion.

involving ecclesiastical law and the clergy. Foreign commerce involves a system of admiralty courts and consular courts to exercise jurisdiction over cases arising on the seas or in foreign countries. There may be a special series of courts for the regulation of family rights as in courts of probate and of divorce, or courts for the separate trial of juveniles. Generally speaking, the development of a specialized line of judicial jurisdiction tends to result in the formation of a special court or series of courts for the settlement of such cases, or if not, then the grade of court that naturally would have jurisdiction over such business may sit in several divisions, each presiding over a particular kind of case.

Again, complexity in organization may be increased by the multiplication of administrative areas beyond the ordinary areas of township, county and state. In this case the jurisdiction of the first and second grades of courts will probably be subdivided for the sake of convenience so as to suit the needs of the additional areas. Or the development of a federation with its dual form of government will duplicate the judicial system of the state as a whole. Or, in addition to the ordinary national systems of courts, there may be a territorial system, a colonial system or the system of a former state now subordinate. In such instances each system should be studied by itself and then the connecting links that bind together the several systems into one common judicial system.

In addition to the several series of courts for the trial and settlement of cases, there is a complicated mechanism to supplement the work of the courts. In order to

bring cases properly before the courts there is a large body of persons acting as police officers or constables to aid in carrying out its functions. As the state now prosecutes in criminal cases, there is a corps of prosecuting lawyers in the employment of the state, aided in their initial work in English countries by the grand jury. Cases may be settled directly by a judge or a bench of judges, or a petit jury may be used to aid in the decision. Punishment in ancient states was administered on the spot, but in modern times long delays and imprisonment regularly follow the verdict. This involves a complex system of prison administration and places of detention. The entire procedure of judicial administration, from the formal charge and arrest to final conviction and punishment, is carefully worked out in modern judicial systems, and every effort made to give the accused a fair and speedy trial, with every possible opportunity to make his defense and if possible to prove his innocence. So detailed have these precautions become that justice is often thwarted by over-emphasis on safeguards, resulting too frequently in contempt of law and mob violence. In democracies, a speedy procedure, impartially and rigidly administered, and the surety of punishment in case of guilt are the safest means of securing justice and respect for law.

Legal Penalties

In criminal matters, the essence of a judicial decision is the infliction of a proper penalty for violation of law. As the early jurisdiction of the state lay chiefly over military offenses, other offenses were visited with pen-

alty by the social agencies of the time. Many of these still survive, but with considerably modified powers.

Forms of
punish-
ment.

A church, a school or a social organization may discipline or punish its members, parents may within reason punish their minor children, public opinion may ostracize or otherwise punish offenders of social decorum, and individuals occasionally undertake to inflict punishment in return for private wrongs. By present theory the entire power of punishment inheres in the state as the keeper of the peace, though in deference to long-standing custom it may permit or delegate the power of punishment to such agencies as those above mentioned.

The infliction of penalty has passed through several well-defined stages, one or several of which can be traced in the history of each of the existing civilizations. Many curious survivals of ancient stages of punishment may still be found even in the most highly developed civilization.

The four
stages of
punish-
ment.

(1) The first period is that of revenge. Penalty in all its forms was savage and cruel. Man's nervous system was in primitive times less highly organized and endured pain more easily; human sympathy was lacking and belief in the sacredness of human life hardly existed. Punishment was ruthless, often out of all proportion to the crime, and frequently involved the innocent with the guilty, under the ancient theory of collective responsibility either of family, clan or fraternity.

(2) As notions of justice developed in men's minds, the desire for revenge became modified into the principle of retaliation. Every offense was to be atoned for by a

similar punishment. It was the period of *lex talionis*, an eye for an eye, a tooth for a tooth, no more, no less.¹ This system also was cruel, but yet in its attempt to secure justice it was an improvement over the vindictive system of the earlier stage.

(3) With the rise of personal property there came a strong tendency to atone by the payment of a fine for all but the worst crimes, blood penalty being exacted only from the worst criminals or from those who were unable to pay fines. Under this system there was a carefully graded list of offenses, each valued at a particular fine, varying in amount with the social rank of the injured person. The fine in early times was paid partly to the injured and partly to the state. Confiscation of property is simply a variation of this form of punishment. With the development of slavery, punishment for crime might in default of fine result in the sale of the criminal, and perhaps of his family also, into slavery for a term of years or for life. As slavery disappeared, this form of punishment survived in sentences that condemned men to labor in mines or on governmental works, to serve in the army or navy, or as servants to private citizens who employed this convict labor on plantations or in various industries.

(4) Another stage of punishment developed when the courts undertook to deter men from crime by the infliction of cruel punishments. This was effected by imprisonment in noisome dungeons, by burning, mutilation, whipping, branding and torture developed to its highest pitch by human ingenuity. Nothing in these days can

¹ See Exodus xxi, 23-25.

be said in justification of such a theory. Experience shows that severity of punishment does not deter men from committing crime. The infliction of it in public even tends to multiply crimes owing to the fascination involved in such awful notoriety. Judges and jury would hesitate in modern times to inflict such punishments and they are regularly forbidden by law. They are still inflicted under lynch law at times when men are overcome by violent passions and vindictive emotions.

In medieval Europe, as well as throughout the Orient, a belief in the efficacy of torture resulted in its use in the

The use of case of persons strongly suspected of crime,
torture against whom, however, there was insufficient
and the evidence to convict, or whose evidence it was
ordeal.¹ thought might inculcate others. These persons were put
to the torture on the theory that persons suffering bodily
anguish will tell the truth. The fact is, that as a rule
they will tell anything their torturers wish them to con-
fess. The use of torture was strengthened by the belief
that, if only guilty persons could be brought to confess
the truth, it would help in the salvation of their souls—
a theological teaching that resulted in the damnation of
more souls than it saved. A peculiar form of punish-
ment developed in many parts of the world and in early
Europe as the result of religious ideas. When men de-
sired to do justice and yet realized how imperfect judi-
cial machinery was in the detection of crime, it occurred
to them that the guilt or innocence of the accused might
safely be left with God. In consequence there developed
a system of ordeals, oaths and judicial combats, the out-

¹ See Lea in Bibliography.

come of which determined the punishment or acquittal of the accused. On the face of it such a system seems puerile, and it is; yet it had its utility in a credulous age where all men really believed that God would in every trial strengthen and protect the innocent and weaken the guilty. It failed when men lost faith in God's intervention in such matters, and devised ways and means of evading the chances of failure by bribery and trickery.

The penal systems of the nineteenth century present a complex of many former stages. Hanging for murder is a form of *lex talionis*. Hanging for other crimes and solitary confinement, aim to deter the commitment of such crimes. The system of fines carefully graded to fit each offense is still in vogue but reserved for minor crimes. More serious offenses are usually punished by imprisonment, not so much to deter others from crime as to segregate criminals from social life. Nor are prisons as a rule horrible dungeons as formerly; they often furnish far better accommodations than those the average workingman enjoys. Prisoners are still compelled to work, but rather with the thought of utility to the prisoner than of actual gain derived from his labor.

Modern penal systems are undergoing rapid transformations. Prevention and reformation are the watchwords of the new century. Careful study of the causes of crime, a better knowledge of psychology and of the respective influences of heredity and environment give grounds for hope that a large part of crime can be prevented and that many criminals can be reformed and made into useful citizens. It is argued that the irre-

claimable should be kept imprisoned permanently for their own sakes, and especially for the sake of society. Such theories are rapidly modifying the methods in use. Probation and right training in reform schools are taking the place of the fine and the prison, and habitual criminals are permanently imprisoned under indeterminate sentences that they may no longer have opportunity to commit other serious crimes. In short, society aims to give every person a fair chance, and to protect itself fully against those who refuse to avail themselves of it.

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CHAPTER IX

THE LAWMAKING DEPARTMENT

As the wealth and population of a state increase, it becomes more and more difficult to govern along autocratic lines. Numerous interests arise which do not receive adequate attention from the rulers; men whose capacity and attainments deserve recognition are slighted, and the private interests of ruling classes absorb most of their energy, to the neglect of public interests. Under such conditions there are historically several possibilities of action:

Rise of a
lawmaking
body.

(1) The *status quo* may be maintained and discontent suppressed by force, in which case the state would probably slowly decay until absorbed by some rival after defeat in war.

(2) A system of decentralization may be encouraged, and each important province be allowed to regulate its own affairs subject to general supervision and tribute, the provinces being held together by mutual interests.

(3) The central authority may retain its power but gradually develop a system of representation whereby important interests and persons may receive due recognition.

This last possibility involves a national application of the idea contained in the organization of a primitive horde or village community. All interests and persons

of importance were included in the small gatherings of these early groups. Even in confederate tribal life the idea had survived in the periodic gatherings of heads of tribes and districts to administer general business. So in the assemblies of the city states of the classic period, every important citizen was able to make his influence felt in the assembly if he were so inclined. The difficulty was to apply the principle to a great national system, and no ancient state ever proved equal to the emergency. Local representation was common enough, and representation of privileged classes in great councils was known, but no system was devised whereby the interests of all the people might be represented in government.

Through a series of events natural enough in themselves, there developed in England during the thirteenth century an assembly of delegates, who represented the common people and petty nobility, as distinguished from the usual assembly of the higher nobility and clergy. Such an assembly was by no means an anomaly at that time. A rude form of representation existed among the Scandinavian people as early as the ninth century. About the tenth century the Icelandic Althing ¹ and the Tynwald of the Isle of Man ² (which still survives) were established. These were made up of elected delegates who prepared laws, which were promulgated as the law of the land. Similar bodies may be traced in other countries of Europe, but they did not attain political importance. The English assembly

¹ Constitution of Ulfiot, A.D. 930. See Bryce's "Studies," Essay V.

² See Caine's "Little Manx Nation."

came when that country was breaking away from agriculture and developing commerce and manufactures, and when kings, ever engaged in war or the suppression of rebellion, were forced to rely more and more upon the support of the common people and on taxes raised from urban centers. So constantly was the king in need of money grants and military support, that the first two hundred years of the history of the assembly of the commons marked an almost steady growth in its power and prestige. During the sixteenth century the historic council of nobles and clergy, who formed the house of lords, was relatively weak. This was due to its depletion in numbers owing to the civil wars and to the nationalization of the church, which deprived that body of much of its power and representation. In consequence the two houses during the Tudor period were fairly equal, and were firmly welded together into a parliament. The rapid development of commerce and manufactures under the Tudors and Stuarts (1485-1688) gradually transferred the balance of power from the lords to the commons as the representatives of these interests, and the rise of England to world supremacy in the nineteenth century made the commons supreme in governmental policy.

The political importance of this development lies in the fact that it revolutionized men's notions of governmental machinery. The ancient principle of governing through privileged classes, basing their claims on noble birth and landed wealth, was superseded by a system of government through persons who represented all the important interests of the

Importance
of a law-
making
body.

state, and who had influence in proportion to the weight of interests and the proportion of the population they represented. The economic advantages of such a system were so plainly manifest that other nations found it expedient to imitate it, modifying the English system to suit their own peculiar needs. In this way developed the modern bicameral legislative body, the center and pivot of the modern democratic movement. Naturally enough, some of these systems of legislative representation are not truly representative, but it must be understood that a true system of representation is an ideal toward which modern governmental organization approximates. States are constantly experimenting with patented devices for the improvement of governmental machinery. Hence such suggestions as those for minority or proportional representation, the use of the initiative and the referendum, improved primary and electoral laws and the regulation of political parties. It is not to be assumed that an ideal system of representation would be best under existing conditions. It would demand for its exercise a lively intelligent interest in public affairs by all the citizens, and that condition has hardly been yet attained in any state. For this reason a system in which the balance of power is in the hands of the wealthy and intelligent classes may prove more successful in some states than a strongly democratic system. Every state, however, should endeavor to increase the prosperity and intelligence of all its citizens, and to expand its system of representation so as to include all persons who have a tangible and intelligent interest in the welfare of the state.

The chance development of the English council through social distinctions into two houses set the fashion for other states also. The confederation of the United States of America preferred a unicameral congress, and this was favored for a time by revolutionary France. This French system was imitated by several of the other Latin states and still survives in Central America and in Santo Domingo. The best argument for the bicameral system seems to consist in the opportunity thereby allowed for the balancing of varying interests and the consequent check on too hasty legislation.

Historically, the prototype of the lawmaking body was the collective body of elders found in all early states. In this gathering met all persons of consequence in those petty communities. When the state had arisen to the dignity of a kingdom or empire, the council consisted of royal princes, great nobles, heads of administration and religion, and of persons famous for their wisdom.¹ In classic times grew up a larger council, supplementing the work of the older body, and including in its ranks the warriors, freemen or citizenship of the state. The feudal councils of medieval monarchies emphasized the necessity of the representation in the king's council of all important districts through their leading nobility. As municipalities became important through their wealth and population, these also were deemed worthy of representation, through delegates appointed or chosen by the corpora-

¹ The Vermont Constitution still assumes that legislators are "persons most noted for wisdom and virtue"! Chapter II, Sec. 8.

tions of the municipalities. The representation of shires or counties in the English system virtually meant at first representation of the lesser nobility. When modern democracy began, emphasis was placed on human beings, irrespective of rank, official position or wealth. These developments broadly illustrate the various factors that have entered into the composition of lawmaking bodies. These bodies, in other words, are made up of heads of communities and men of personal capacity, persons of dignity who represent nobility of birth, large landed wealth or important offices in church or state; persons who represent the collective wealth of a locality or persons who represent collective bodies of men irrespective of wealth. Monarchies regularly emphasize birth, social standing, office and wealth; democracies incline to emphasize persons and wealth.

In modern monarchies the lawmaking body has its upper house made up of members of the nobility and of the chief dignitaries of administration and religion; its lower house will generally be composed of representatives from localities, on the basis of wealth or population, but as a rule discriminating against the poorer and illiterate classes. Republics seek to embody in the upper house the larger interests of the state as against pettier interests in the lower house. In federations the commonwealths are represented as such in the upper house, and population and wealth in the lower house. In the commonwealths of the United States of America, the tendency is to make the upper house represent population areas about three times as large as those of the lower house. As a rule there is no fixed principle in regard to

the relative size of the two houses. The upper house is regularly, but not necessarily, smaller than the lower. Large bodies are so cumbersome that the tendency is to reduce the relative numbers in both houses, but many local factors modify this tendency.

In monarchies, kings or emperors regularly initiate all bills through their ministers. Members by favor may make suggestions in the form of petitions. In constitutional monarchies all members have the right to introduce bills and regularly do present bills of a local or private nature. It has, however, become the practice to allow only party leaders, or a responsible ministry, to present all bills of importance. Such bills are prepared with great care and represent the policy of those in power. In republics the members of either house may initiate bills. In some federations the commonwealths may have the right to introduce bills directly, as in Mexico, or in democracies the electorate may exercise the same privilege through the *initiative*.

Besides these formal methods of initiating legislation, there are other ways whereby matters involving legislation may come before the legislature:

(1) The executive may make suggestions to the legislature requesting legislation along specified lines. Such suggestions are frequently made by administrative departments with the approval of the executive:

(2) Committees or commissions are frequently authorized to consider questions of policy and to recommend to the legislature suitable lines of action.

(3) A citizen or body of citizens may exercise the

¹ See pages 220-223.

right of petition and request the legislature to grant relief in certain specified matters. The legislature is not bound to follow such suggestions, and may ignore them altogether or adopt them as may seem most expedient at the time. Whenever it may seem advisable, legislatures may authorize the holding of public hearings, at which all persons interested in the success or defeat of the proposed bill are invited to be present and present their reasons. This device enables a lawmaking body to keep in closer touch with public opinion than otherwise would be possible.

In the development of lawmaking powers, certain privileges have become fundamental in theory. A house

Privileges
of legisla-
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must have the right to decide disputes in regard to its membership, such as contested elections. It may delegate the decision of such contests to the courts, as in England, but the final power must reside in the house. It must be able to punish its members for unseemly conduct, to coerce others to obey its lawful orders, and to maintain its dignity by punishment for contempt. Its members, even when going and coming, must be free from arrest except for serious crimes; they must be allowed freedom of debate without fear of future accountability, and their dignity as representatives must be fully secured. Each house must also have the right to make its own regulations and its rules of procedure.

These rules vary greatly in different bodies, but are always important. They provide for reading of bills, discussions, amendments and passage, carefully specifying each step with the purpose of allowing no bill to

pass until each member of the house has full knowledge of its contents and opportunity to express an opinion for or against the bill. To this end bills are read several times, debated either before a committee or in the presence of the house, thrown open to amendment, and when finally submitted for passage each member must be allowed full freedom in voting. If comparatively few bills are presented in a session, procedure is simple. As, however, the number of bills increases with democracy and growth in national importance, pressure for time compels modification in the system. This may be (1) in the form of restrictions on debate by limitations on the time allowed for it, and by the use of the *closure* and the *previous question*, or (2) by making a distinction between bills which affect the public as a whole and those which relate to private persons, localities and details of administration. Historically, legislatures have handled all kinds of bills and passed them by the same kind of procedure. The result is that the larger part of legislative activity may be spent on what is really administration. Lawmaking bodies, through their control over finances, have to spend much time in devising efficient ways and means of raising and expending moneys and in the supervision of expenditures. English-American systems, through their fondness for working out the details of legislation, pass numerous laws designed to suit particular cases or special emergencies; matters usually left in other states to the ordinance power of the executive or to some department of administration. Such bodies, therefore, besides having real legislative functions in the formulation of policy

Rules of
procedure.

through law, also exercise a vast ordinance or administrative power which is liable to be used in a perfunctory or inefficient manner. By far the larger part of the unpopularity of modern legislatures is due to the evils arising from this confusion of legislative and administrative functions. In modern days the pressure of business is compelling a different procedure for private or local bills so that the time of the whole house need not be wasted. Such bills may be referred to committees, whose decision will be accepted as a matter of course; or classes of private bills may be assigned to an administrative or judicial body for settlement in accordance with some principle laid down by the legislature. Such a distinction is important because the number of private bills introduced is always large, usually more in number than public bills, and public interests have to be neglected when so much attention is given to matters of small public importance.¹

When legislative business becomes too large entirely to be handled by the houses even with the above regulations, then a committee system is inevitable. The
committee
system. It may (1) take a form like that of the English cabinet, which is practically a legislative committee for the formulation of policy, the preparation of important bills and advocacy of them before the houses. Or (2), as in the French system, committees may be appointed by the lawmaking bodies to consider, modify and report on ministerial bills and such others as may be referred to them,² or (3), lacking a cabinet system for

¹ See "Our State Constitutions," pp. 46-54.

² See Lowell, vol. i, pp. 111-117.

the initiation of bills, as in the United States of America, all bills may be referred to standing committees of the respective houses, which are authorized to investigate them thoroughly and to make recommendations. This committee system has become so important in the United States of America that it has almost usurped the deliberative function of the lawmaking bodies. All bills when entered in the houses are promptly referred to committees, which derive their importance from the nature of the business intrusted to them. Most of these bills are pigeonholed and are never reported, a few may be reported adversely or without recommendation, and others, after investigation, public hearings, amendments and perhaps complete revisions in committee, are reported favorably. The pressure of time is usually so great that debate seldom arises over the reports except when the subject is of great importance and involves political interests. These committees are so arranged that the dominant party controls the results of their decisions. The chairmen of the chief committees are also leaders of that party and form a sort of inner circle, not unlike the English cabinet, for formulation of policy. Some one person is selected as head leader and placed either in the chair of the house with autocratic powers, or in the chairmanship of one of the principal committees and authorized to guide the party on the floor of the house. The committee system is open to many objections, based chiefly on its secrecy of procedure and its practical usurpation of legislative functions, yet it is plainly useful and under present conditions necessary. Time may remedy its defects or substitute in part a

system that may insure greater responsibility and susceptibility to public opinion.

The passage of bills by a legislature does not always imply that such bills at once become laws. There are usually general or special provisions specifying at what times the bills shall take effect. In addition to this almost all states place in the executive's hands the veto power. This may be absolute or suspensive. In the first case an executive's veto kills the bill and the labor of the legislature has been in vain. In the second case the bill is sent back for reconsideration. If on reconsideration the bill again passes, no further veto is interposed. The absolute veto is used only in monarchical systems. The use of the English cabinet system virtually makes this veto obsolete, for all bills submitted to the king for signature have been approved by his cabinet, and under such circumstances the king would not venture to oppose the combined wishes of his cabinet and lawmaking body. In some states, also, before bills are finally passed, they must be submitted to the electorate for approval or rejection. This form of veto, known as the referendum, is found only in countries where democratic influences are powerful.

When the English house of commons began to exert its powers, it was almost entirely under the control of the executive, who sent his ministers into the house and tried to dictate or influence its decisions. This was the reason why the house fought so vigorously to control the appointment of the king's ministers. When this had been accomplished, the

The veto
power.

Formu-
lation of
legislative
policy.

house was thereby able to dictate to the king his policy. It is inconceivable that a wise king would refuse to accept the advice of a ministry who represented the will of a dominant parliament. There are, therefore, two great monarchical systems for the formulation of governmental and legislative policy: (1) the will of an autocratic king expressed through his ministers, or (2) the will of a parliament expressed through a ministry forced on the king. The essence of the distinction is best obtained by noting whether the ministry is responsible to the king only, or to the parliament. A system like that of Germany or Austria-Hungary balances between the two.

In the United States of America, owing to the use of separated coördinated departments, the English system was not feasible. How legislative policy should be formulated under such conditions was a problem. At first the president, aided by prominent members of the congress, dictated this policy, and this system might have become permanent had the president's views regularly harmonized with the opinions of congress. This, however, was seldom true after 1824, and in consequence each house developed a system of voicing its policy through a legislative caucus. The members of the dominant party in either house meet in private session, formulate a policy and intrust the execution of it to their natural leaders, who, as chairmen of the principal committees, are able to control legislation. In the house these powers are centered in the speaker, who, subject always to the approval of his party following, directs the machinery of the house toward the

The
American
system.

accomplishment of the policy outlined by the caucus. The system is practically the same in both houses, except that in the senate, as the presiding officer is by constitution the Vice-President of the United States of America and is not subject to the control of the senate, the chairmen of the principal committees unitedly guide the senate's policy. In the American system, therefore, legislative policy is voiced through party caucuses under the guidance of their leaders, who act as chairmen of important committees and thus control legislation. As the president has the veto power, if he and the two houses of legislation are of the same political party, frequent conferences will be held so as to settle on some common policy. If they are not of the same party, then important legislation is either not passed or is passed by a series of compromises after numerous joint conferences have been held.

A legislative body, therefore, in formulating its policy will either name the executive's council and work through them, or will work through its own leaders and then seek to harmonize its policy as far as possible with that of the executive department. In the study of any state which has a legislative department, therefore, one should note carefully the respective powers of the two departments in the formulation of policy, and should see how harmony of purpose is attained. When the two departments are evenly balanced in power, conflicts for supremacy may arise, as in Germany and Japan. In Mexico the two departments are theoretically coördinate, but in reality the executive dictates legislative policy. France uses the English cabinet system in form, but the

legislative leaders of the chamber of deputies dictate the policy to be followed by the cabinet much more fully than do the leaders in the English house of commons.

In tribal communities, popular assemblies made up of warriors or freemen usually have merely the power of assent or dissent to proposals submitted by the smaller council of leaders. The large powers exerted by the popular assemblies of Athens and Rome are familiar to all students of the classics. When the English house of commons began its existence in the thirteenth century its powers were extremely meager. It met simply to advise the king in regard to the amount of taxes its members would be willing to have assessed on their constituencies. But the commercial instinct of *quid pro quo* soon led these delegates to a series of bargainings, whereby each grant of money on their part resulted in the gain of privileges extorted from the king and nobility. Each class naturally legislates for its own interests, and, during the *régime* of king and nobles, commoners had secured only the crumbs. But on the other hand, as they came into power they secured for themselves more and greater concessions, until they won as their right supremacy in legislation and in governmental policy. This really amounts to a revolution in governmental systems. In place of an autocratic monarch, the fountain of law and justice, surrounded by nobility and clergy as bulwarks of the throne, aiding him by advice, arms and spiritual terrors, there has developed an autocratic assembly which allows the king to remain in office during good behavior, but reserves the privilege of beheading or removing him at

Powers of
the popu-
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bly.

will, and which forces him to accept as his cabinet its own leaders and to formulate a policy in governmental matters only after consultation with, and approval of, the cabinet. It is evident that such a body, though nominally legislative, is more than that, for, through its leaders and by its lawmaking and constituent powers, it guides and controls the entire business of the state, executive and judicial as well as legislative. This rise of a popular assembly into power depends, as already explained, on the development of large commercial and manufacturing interests. The spirit of an autocratic monarchy seems to find its best expression in a state which relies chiefly on agriculture. The stability and uniformity of that life seem best to suit the conservative instincts of king and nobility. Commercialism tends to introduce a more flexible executive system; it weakens belief in the divine right of king and nobility and demands leaders in sympathy with commercialism and capable of readjusting the political system to the changing conditions of the age. This change may be brought about conservatively by depriving king and nobility of political power, but retaining them as social "survivals" or ornaments; or, more radically, by substituting in their stead elective officials, who may be removed from office at stated times or whenever necessity requires.

So important a change as this is not easily accomplished and seldom without revolution. The history of all commercial states, ancient or modern, illustrates the principle. In England the process began by attempts on the part of the house of commons to compel the king either to accept ministers named by it or to consent

that ministers named by him be responsible to the house. Bills of impeachment and bills of attainder were weapons used by the house in the attainment of its object. The Puritan revolution and the revolution of 1688 definitely fixed the principle and applied it to kings as well as to ministers. The rise and development of the premiership in the eighteenth and nineteenth centuries worked out a system whereby the real work of government might be done by the house, while retaining the forms and appearance of an autocratic monarchy. The United States of America at the adoption of its constitution went one step farther when it refused to establish kingship and nobility, and in their stead established an elective head assisted by ministers appointed or elected for definite terms, all subject to removal on impeachment by the lawmaking body. Naturally these same principles apply to the struggle for supremacy which generally arises between the two houses of legislation. In monarchies they represent distinct sets of interests, not always harmonious. Each desires to have the final voice in decisions, and victory ultimately goes to that one which represents more truly the broader interests of the nation. In democracies the two houses tend to represent practically the same kinds of interests, and full coöperation is hindered only by natural rivalries based on beliefs as to the respective importance of the two houses.

The numerous functions of modern lawmaking bodies may be broadly classed under four heads, though there are many differences in detail and in the scope of powers exercised under each head.

(1) They have the right to declare and to formulate the law of the land, removing what has become obsolete, making clear what is ambiguous, and supplying new laws to suit the changing conditions of social life. This flexibility introduced into law has enabled states to adapt themselves readily to altering conditions, a thing well-nigh impossible under ancient theories of fixed and unchanging law.

Functions
of legisla-
tive bodies.

(2) They have the right to decide on the amount of tax to be levied for governmental purposes, the goods or other property on which it should be levied and to control the levying and expenditure of such taxes by reserving the right to hold responsible and to instruct, or even to appoint, all important officers in charge of public funds. This "power over the purse" has been the most effective agency in enabling the lawmaking body to control the other departments of government.

(3) Lawmaking bodies have slowly won or are winning the right to dictate the policy of the state in international affairs. This historic power of the executive is passing under the control of the legislative department, which leaves to the executive the form of power, but exercises the substance of it through its control over finance and over the ministry or cabinet of the executive.

(4) The lawmaking body in many other ways is now able to exert power not primarily legislative. It may exercise judicial functions in deciding cases of contested election, or in trying its own members or officers of the other departments of government. In its usurpation of powers properly executive it may appoint, or assist in the appointment, of officials, make treaties, declare war,

regulate the army, navy and civil service, appoint and supervise administrative commissions and regulate more or less completely the policy and administration of the other departments of government.

These classes of functions show clearly the importance of lawmaking bodies in political development. Almost unknown in western civilization down to the nineteenth century, except in England and her American colonies, they have suddenly pushed to the front as agencies for economic and democratic development, and have reached perhaps the acme of their powers. Their natural limitations are now becoming manifest, and at present they do not enjoy the confidence formerly placed in them. It remains to be seen whether by internal changes they will become more efficient and regain lost confidence, or be superseded by more trustworthy governmental agencies.¹

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¹ For example, by the constitutional convention in the making of fundamental law, and by the electorate through its use of the initiative and the referendum.

CHAPTER X

THE LEGAL SOVEREIGN AND THE ELECTORATE

The Legal Sovereign

IF one were carefully to observe in any given state the several divisions of government, and to note the fundamental powers respectively exercised by each, and the manner of such exercise, he would thereby become familiar with the fundamental law, or the constitution of the state. Every state, whether democratic or autocratic, has a constitution. This is not the same as saying that every state has a constitutional form of government, which would imply that the rights of the people are fairly well secured by law against possible governmental tyranny. It is, however, obvious that every state, no matter how despotic or autocratic it may be, has a form of organization, made up of several departments exercising sovereign powers, and has a well-defined customary way of exercising such powers. Such constitutions may not be written, and in most states are not, yet jurists familiar with any given state could readily write out the constitution of that state, whether it be an autocracy, a federation or a democracy. Evidently, then, every state from the moment when it begins its existence has a constitution, which may be defined as that fundamental law or body of laws, written or unwritten, in which may be

found (a) the form of the organization of the state, (b) the extent of power intrusted to the various agencies of the state, and (c) the manner in which these powers are to be exercised.

Such a constitution regularly voices the will of the dominant part of the community, i. e., that part which contains the strength, wealth and intelligence of the nation. The persons who compose this dominant part will not necessarily themselves formulate the fundamental law of the state, but by formal appointment or tacit consent they will permit some person or body of persons to order the framework of the organization of the state and the powers to be exercised by its several agencies. In a well-ordered state the constitution will fully and exactly voice the wish and will of the entire community, but generally that is rather the ideal than the rule. In practice the constitution will represent, as already said, the will of the dominant part of the community, often to the neglect and even to the injury of the interests of the other members of the body politic. The aim of democracy is to develop a constitutional system voiced in the composition of the lawmaking body that will allow all the interests of the nation to be adequately provided for in the constitution. The Russian parliament, mentioned on page 136, in the composition of the upper house, and in the electorate which determines the membership of the lower house, affords an illustration of an aristocratic system of representation. Bluntschli, in his "Theory of the State," ¹ explains his notion of the representation

The constitution as representative of dominant interests.

¹ Book VI, Chapter XXIII.

of interests; and modern democratic movements toward some system of minority or proportional representation illustrate another aspect of this question.¹

As a state in the exercise of its sovereignty may have occasion from time to time to amend or even to revise entirely its constitution, so as to adapt its life to newer conditions, there must be in every state a person or body of persons recognized as having the legal right to perform such a function. This agency of the state voicing its will in the enunciation of its fundamental law, is the legal sovereign. The legal sovereign, then, in the exercise of its power decides the form of the organization of the state, assigns powers to the other departments of government, prohibits the exercise of some powers and designates the manner in which the several powers assigned must be exercised. It may even specify the manner in which it will exercise its own powers, but such specifications must be considered as constitutional guaranties, not as limitations on its activity. In other words, the legal sovereign voicing as it does the absolute sovereignty of the state cannot legally bind itself not to exercise any part of sovereignty. It may give a formal pledge in the nature of a limitation of its powers, but the binding force is moral, not legal, for a legal sovereign unable to perform its sovereign function would be limited in its powers, and hence not the repository of the most fundamental of sovereign powers.

¹ See reference to J. R. Commons, at end of chapter, and Bulletin No. 14, Proportional Representation, Wisconsin Legislative Department.

In exercising this great power the legal sovereign should represent the will of the nation, and, as a rule, will more or less fully voice the desires of the people as a whole. As, however, states are constantly changing the conditions that determine their development, a legal sovereign designed in one age to express the will of the body politic, may in a later age fail to represent correctly that will. In such a case if the legal sovereign of its own accord fails to modify its composition so as to suit newer conditions, a revolution will probably take place after a period of dissatisfaction and agitation. This is the so-called Right of Revolution, the right of a community which finds itself hindered in development by existing forms, to overthrow these and substitute others more in accordance with the will of the community. Such a right must of course be justified on moral grounds; legally speaking all revolutions are rebellions and in violation of law.¹

In old-fashioned monarchies the legal sovereignty will naturally be found vested absolutely in the king, or in the king and his council, under the theory that these truly represent the larger interests of the state. In such cases the king, or the king and his council, may alter at will the fundamental law of the land. The inertia of custom and the fear of revolution or assassination may deter the king from making unpopular alterations, but if any changes at all are legally to be made, he is the proper agency to decide on and to enunciate them. If in such a state a representative council or a legislature should develop, this

Location of
legal
sovereignty.

¹ But for a legal basis for rebellion, see Article 61, Magna Charta.

body may gain the right to share in the exercise of this power, and the three bodies, king, council and legislature would then form the legal sovereign, as in England. In a similar manner the powers of the legal sovereign may pass entirely from the head of the state to the lawmaking body, as in France, or to the lawmaking body and the electorate, as in Switzerland. If the state be completely democratic, the electorate alone would exercise that power. This stage has almost been reached in Switzerland, through the use of the initiative and the referendum, and in some of the commonwealths of the United States of America through the use of the constitutional convention. In a federative form of government, the federal lawmaking body, combined with the lawmaking bodies of the federated commonwealths, may constitute the legal sovereign, as in the national system of the United States of America.

In respect to legal sovereignties located in lawmaking bodies, as in Great Britain, France and the United States, it might properly be maintained that the electorate also should be considered as legally a part of the legal sovereign, so far as it has the right to determine by election the membership of the parliament or legislative body. This would certainly be true if the electorate had also the right of instruction and of recall. If, however, the lawmaking body, when elected, has full discretion in respect to its policy, irrespective of instructions from constituencies, it may be better, on the whole, to consider that body for all practical purposes as the legal sovereign.

In an absolute form of government the personal sov-

ereign will also be the legal sovereign, but the double aspect of the sovereign under such conditions is clear. Similarly if a legislature happens to be also the legal sovereign, it is always possible to distinguish between the legislature as a constituent and as a legislative body.¹ Likewise, in a democracy the electorate is the legal sovereign only when it directly exercises the powers of the legal sovereign. In the national system of the United States of America, e. g., the electorate is not legally sovereign, for the constitution vests the power of amendment in the national congress and the legislatures of the commonwealths. The electorate may request these to pass amendments, but has no power to command them so to do. Theoretically, these lawmaking bodies might at their discretion change the republic into an empire or into a socialistic form of government, without consulting at all the wishes of the electorate. The same illustration might apply in the case of Great Britain. The legal sovereign is the king in parliament, and action taken by this body is legally final, irrespective of the wishes of the electorate.

In a study of the practical workings of government, one may see that an autocrat ruler will make no important change in the constitution without first consulting his advisory officers; that the will of the king in parliament may be virtually expressed by the leadership of a dominant political party in the house of commons; that American lawmaking bodies will carefully consult

¹ In the United States the president, for example, may veto acts of congress, but he has no veto power over amendments to the constitution passed by congress.

popular wishes before passing constitutional amendments; and that countless other restrictive influences are brought to bear on the personnel composing the legal sovereign. Such matters of practical politics must be carefully studied before one can fully understand the political system of a state, but after all there is a wide difference in idea between the legal right to accomplish constitutional changes, and the sum total of all the factors and motives that may enter into the formulation of such changes.

The legal sovereign often has a revolutionary origin, and may frequently undergo changes in composition.

The legal
sovereign
in origin
sometimes
revolu-
tionary.

For instance, the legal sovereign in the American colonies before 1776 was the king in parliament.¹ The Declaration of Independence and the action of the colonies made these from the American standpoint, free and independent states, held together loosely in a confederation. These states in congress assembled agreed to adopt a constitution, provided all the states gave their consent. When this had been accomplished, by 1781, the legal sovereign of the confederation was the several states acting formally through the congress. When revision became urgent, the Convention of 1787, knowing the impossibility of securing unanimous consent to the proposed constitution, suggested that it go into effect provided nine of the thirteen states gave their consent. The adoption of this suggestion and its accomplishment amounted virtually to a peaceful revolution and the establishment of a new legal sovereign. The constitu-

¹ Or, as argued by some, the king in council.

tion adopted, however, provided that future alterations should be made by the joint consent of congress and of the legislatures of the states, or of conventions especially called for that purpose.¹ This constituted, therefore, a new legal sovereign, so that at the present time no legal amendment or revision of the national constitution is possible, except by the joint action of these lawmaking bodies.

In the several commonwealths of the United States of America Rousseau's theory that the people should legally be secured against governmental tyranny has found full development. The early practice of the states was to assume that the legislature or assembly had constituent powers also, but this ran counter to the rising tide of democracy. The importance of a written constitution embodying a fundamental law superior to the statutes of a legislature, was soon recognized. In order that the electorate voicing popular interests might more completely control this law, the constitutional convention was brought into use and developed. This agency, elected directly by the voters and submitting its work to them for approval, has proved remarkably efficacious in securing popular rights. The effect of it is, that whereas in the national system legal sovereignty inheres in the lawmaking bodies of the federal government and the states, in most of the commonwealths themselves the fundamental law is controlled by the electorate, through the convention and the referendum. In consequence, the real development

¹ By a vote of two thirds of each house of congress, and three fourths of the states. Article V.

of American democracy should be studied, not so much in the national system as in the local systems of the states, which illustrate much more clearly the virtues and defects of a popular democracy.

The Electorate

In primitive horde life there was a sort of rude democracy. Though control was practically in the hands of the elders, yet these did not form an hereditary class. Each had attained the honor through merit or the wisdom of age. Every young man, so to speak, had in possibility a "marshal's baton" in his grasp. The same idea holds in the tribal democracy of pastoral life. A nomadic, warring stage of existence is not suited to hereditary aristocratic government. Power goes to the one who best can wield it. In patriarchal agricultural life the situation was somewhat different. Class distinctions based on birth and wealth had developed. Hence arose a leisure class trained in a more generous environment than that of the common man. They were keener and more intelligent, and were dominating in personality. Power naturally belonged to them. Yet after all they were in close touch with the freemen of the community. All were akin and trod the routine of life together; hence the leaders truly represented the ideas and interests of the entire community as well as though they had been elected representatives. But when the era of commerce began, and the population of the community multiplied through the influx of aliens and merchants, the hereditary heads of the community would not adequately represent

Its devel-
opment.

the differing interests of the growing city or city state. Hence a demand for representation, not of persons as in modern democracy, but of interests and localities. Such demands and their satisfaction are illustrated by the reform legislation of Solon and of Servius Tullius, who arranged that wealth and occupation should have a share in governmental power. The culmination of this movement in classic times is best known through the struggle of the plebeians against the patricians in Rome, which finally resulted in the bestowal on every citizen of a voice, however slight, in the affairs of government. This voice was expressed by formal vote cast on stated days.¹

When citizens, as such, meet in a formal way, and at a set time, and in a definite place and manner, express their choice by vote for representatives or for governmental measures, they form in effect an *electorate*, which term may be defined as that body of citizens legally authorized to participate in the exercise of some of the sovereign powers of the state. Feudalism and medievalism minimized the necessity for this democratic device, except in the commercial centers of Italy and Germany, but with the fifteenth and sixteenth centuries the rising tide of democracy once again brought the notion of an electorate to the front. Its philosophic expression was in the famous social contract theory. In religion it voiced itself in the teaching that before God all men are equal and responsible. Its economic equivalent was voiced by Adam Smith in free competition and *laissez-faire*.

¹ For an excellent brief study of these movements, see "The State," by Woodrow Wilson, pp. 64-120.

In England a national electorate formally came into existence when municipal corporations and county or shire courts were authorized to send delegates who should assist the council in advising the king. The membership of these corporate bodies was small and not truly representative at first, but as their delegates gained power in parliament there came a gradual enlargement of the elective franchise, until at the present time about one person in six has the suffrage, which is practically manhood suffrage. This enlargement took place chiefly by reducing the property qualification necessary for suffrage and by removing disabilities based on racial and religious distinctions. Wherever there develops a virtual equality of economic opportunity and conditions, emphasis tends to be placed on human equality. Hence manhood suffrage came much earlier in countries under the influence of American and French democratic ideas, and the more radical democratic world has even admitted women to the same suffrage privileges as men, as, for instance, in four of the commonwealths ¹ of the United States of America and in most of Australasia. When both sexes exercise the suffrage the terms adult, or general, suffrage are used. ²

It is important to note that wherever an electorate exists it becomes *ipso facto* as truly a part of the government as any other department exercising political powers. The powers which an electorate may exert vary considerably in extent in different states, but the

¹ Colorado, Idaho, Wyoming and Utah.

² The term *universal* is often incorrectly used for either manhood, or for adult suffrage.

tendency in democracies is to bestow increasingly larger powers, as citizens attain greater intelligence and political capacity. The powers usually assigned are executive. That is, the electorate may be authorized to appoint candidates to certain designated offices through forms of election. These offices may be (1) executive or administrative, as in the election of a president, a governor, a mayor or the head of an administrative department; or (2) judicial, as in the case of judges elected by popular vote, the prevailing system in the commonwealths of the United States of America; or (3) legislative, as in the election of delegates to lawmaking bodies. Occasionally the electorate is authorized to aid directly in legislation through the initiative and the referendum. At times, also, the electorate secures the right to assist, through delegates chosen by lot, in judicial decisions by the performance of jury service. These are direct powers and are important in proportion to their extent. If, e. g., an electorate should directly appoint by election all important officers of the three historic departments of government, and should have a deciding voice in the formulation of the constitution, its power would be enormous. If, also, the electorate were composed of all adults in the nation, the people might well be said to be exercising full sovereign powers.

Electorates, however, rarely have so much power assigned to them and seldom include all capable adult persons. Theories of social welfare may result in modifications of the principle of manhood suffrage by introducing restrictions intended to discriminate in favor of

the more intelligent and reputable classes. Such discriminations may be made by requiring a minimum standard of education or intelligence, by emphasis on economic capacity as shown by the possession of taxable property or the pursuit of an honorable occupation, by disfranchisement of the pauperized and the criminal part of the population and by restrictions based on sex, religion or service in certain branches of governmental administration. In some states special suffrage privileges are given to graduates of universities, to married men and to fathers of families.¹ In aristocracies there may be an electorate composed of a small class of nobles or of persons of wealth. In any so-called democracy it is always important to note (1) the restrictions on suffrage, and (2) the direct powers placed in the hands of the electorate. The restrictions may be so great and the power so slight that the system is really a close oligarchy, as is the case in practically all of the states in Latin America.

The most ancient method for the formulation of a decision through suffrage is that known to-day as *viva voce*. A question is submitted to the assembled voters for their approval or rejection, and by word of mouth, show of hands or other sign they signify their decision. Ancient familiar examples of this may be found in Hebraic history, the Homeric Ecclesia and the Germanic Assembly of Tacitus. Modern examples are seen in the town meeting and in ordi-

¹ As types of these, note suffrage provisions in the constitution of Belgium, Article 48, and of Mexico, Article 34. Dodd, "Modern Constitutions."

nary social organizations. The present usual form of suffrage is through the secret ballot. This device was regularly employed by the Athenians and the Romans, was revived in the period of the Renaissance and is now in use in an improved form in practically all modern states. The English ballot act, superseding the ancient method of election, was not adopted until 1872. The improved method in use throughout the United States of America, popularly known as the Australian ballot system, was adopted in the last decade of the nineteenth century.

A Newer Democracy

Underlying the great political movements of the time there is manifestly a rising tide of democracy, not representative in type, but tending always toward a direct participation of the electorate in the formulation of fundamental policy. Naturally one would expect under such conditions a vigorous governmental activity in respect to general welfare. As illustrations of both of these aspects of the newer democratic spirit the growing use of the initiative and the referendum will be noted, and the governmental activities of the Dominion of New Zealand, where apparently the Mecca of radical democracy has been established.

Historically speaking, the initiation of projects of policy belongs to the executive, who has the right not simply to suggest, but to order a policy. Naturally this power is shared with his council, and in practice may pass from him to it. With the rise of a lawmaking body a new problem presents itself in the query as to whether

its members also shall be allowed the privilege of initiating law. The English solution was that the members of the newly organized parliament offered their suggestions in the form of advice or as a petition. In Russia, under the present system, the czar reserves the right to initiate all fundamentals, but permits members of his parliament to initiate matters of minor consequence, provided these be submitted to him for approval or rejection.

Another stage of development is noted in a modern system like that of the national government of the United States of America. Under this system the president and his cabinet, in the form of the president's message, suggest to the lawmaking body a policy of legislation, but the initiation of these suggestions, or of any other suggestions whatsoever, is optional with the membership of the congress. Whatever policy, however, this body may adopt, as testified by the passing of bills, must be referred to the executive for approval or disapproval, by his use of the veto power. The present English system, so frequently imitated in other states, lies halfway between this and the earliest system. The members of the king's council, the cabinet, are at the same time members of the lawmaking body, and are both legislative leaders and authorized royal advisers. As leaders they dominate the initiation of a policy to be passed as legislation, and as advisers they voice the king's will; so

¹ By *initiative* is meant the right of the electorate to propose laws, and to demand that these be submitted to the voters for approval or rejection. By *referendum* is meant the right of the electorate to demand that legislation passed by a representative body be submitted to the voters for final approval or rejection.

that, while bills are formally referred to him for approval, consent is given as a matter of course.

The next step of development is especially important and needs careful consideration. With the growth of democracy there develops an electorate, and the question arises as to its relationship to the lawmaking, or policy-fixing, body. If this is answered by authorizing the electorate to elect the members of the lawmaking body, then a system of representative government is established. This system is strengthened if at the same time the voters may determine the choice of the head of the state, or the personnel of his cabinet. Given such a representative system, the problem then arises as to the best methods of securing a true expression of the will of the electorate through its representatives. It will be impossible to trace in detail the many devices to this end, but the most important of these may at least be mentioned.

In the first place, devices in respect to elections¹ develop one by one; a limit is placed to the duration of the term of office, and careful provisions are made for nominations, balloting and the counting of votes. There is possibly a system of minority or proportional representation, and, in general, a supervision of the mechanism of party machinery. Then arises the question whether representatives may be instructed, and how, if anyone should prove recreant to his trust, he may be deprived of his office and recalled to private life. Fol-

¹ For discussion and numerous references, see Bulletins Nos. 3 and 13, Wisconsin Legislative Department, "Corrupt Practices at Elections, and Primary Elections."

lowing closely comes the notion that lawmakers may be instructed by placing over them a fundamental law, formulated by a special body in close touch with the electorate, and containing essentially a policy for a generation at least. Again, the electorate may assert its right to suggest by petition, or to advise by public hearings, what in its opinion should be the policy of the state, and finally may assert its right to have laws referred to the voters for their approval or rejection, and may even authorize these to initiate a bill or a constitutional amendment, and to have it referred to the law-making body or to the voters for approval or disapproval.

If such a development were supplemented by a similar growth of the representative character of the electorate, as voicing the wish and will of the people, by removing, for example, distinctions based on rank, property or sex, a condition might easily be reached in which the electorate would be practically identified with the people, barring minors and incompetents, and would be legally exercising the fundamental powers of the state by its right to initiate and determine the policy of the state. Evidently, therefore, a state in working out its governmental system along democratic lines, has the option of seeking to build up either a truly representative system closely in touch with the popular will, or of inclining more and more toward a direct democracy by the use of such devices as the initiative and the referendum.¹

As this last alternative finds its storm center in Switzerland and in the United States, a brief statement

¹ For references, see "The Initiative and Referendum," Bulletin No. 11, Wisconsin Reference Department.

in regard to these experiments may well be given. Remembering that the early Swiss cantons were small rural communities, clannish and conservative by disposition, it would seem natural enough that they should use the direct democratic system of the village, with its elders as a council. But when administration grew in importance and complexity there slowly developed a system whereby the initiation of a policy was delegated to suitable bodies, although subject to popular approval on reference. In this way the electorate checked or balanced the power delegated to its magistrates. In federal affairs the constitution of 1848 gave formal voice to this system, and its later amendments have made still more emphatic popular control over fundamental and statutory law. Under the present constitution there is an optional referendum in respect to statutes passed by the Federal Assembly and a compulsory referendum in amendments or revisions of the constitutions. For constitutional purposes the initiative also is authorized but is sparingly used.¹ In the cantons or commonwealths, likewise, these provisions have gained ground, until it is said (1902), that "All the cantons possess the initiative, either in constitutional or legislative matters, or both; and all, except Freiburg, some form either compulsory or optional, or both, of the referendum."²

Opinions differ widely in respect to the utility of the system, even among the Swiss themselves. To some

¹ But five times in the ten years following its adoption in 1891; four of the measures initiated were rejected at the polls.

² Report A. S. Hardy to department of state. "House Documents," vol. i, p. 991, Fifty-seventh Congress, second session.

it means the rule of an unreflecting mob, moved by impulse and prejudice, and dominated by motives of immediate utility or expediency. Others argue for it as a great device for popular education on political questions, and seek to show that in result the voters seem to be at least conservative rather than radical, erring occasionally through ignorance, but on the whole manifesting an intuitive common-sense appreciation of questions submitted, if these are not too technical nor too detailed.

It seems obvious that the experiment is being tried under most favorable conditions. Switzerland is a neutralized state, its people are thrifty and intelligent, and in close touch with modern civilization. Certainly neither the federal government nor the cantons show any disposition to repeal the system, and it is probable that with experience and deepening intelligence that state may yet devise a workable system of direct democracy coöperating with a well-ordered, representative form of government.

In the federal government of the United States neither the initiative nor the referendum is in use, though there are occasional movements looking toward the introduction of the referendum into the federal system. In the commonwealths the following classes of legislation find illustration: (1) In practically all of them the referendum is used in purely local matters, usually in the form of statutory authorization of local bodies politic to decide for themselves, whether or not some local bill, or a local application of some general statute, shall go into effect. In the same

Direct
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manner there is in many states a local initiative in use, as, for example, when the voters of a locality petition for the submission of the question of license or no license. (2) Again, in many cases a state constitution may authorize its legislature to refer to the voters of the state some particular kind of general legislation, such as, for example, a proposition to issue a bond series, or to adopt prohibition or woman suffrage. Such general referendums, to be constitutional, must be authorized by the state constitution. (3) Beginning in 1898 with South Dakota, several states ¹ by constitution have authorized the use of the initiative and referendum in general state legislation. So far Oregon has made the most effective use of this device. (4) Starting with Massachusetts in 1779-1780, new or revised constitutions and amendments are now regularly referred to the electorate for approval or rejection. Delaware alone of all the states does not submit amendments, and some states, especially in the South, promulgate constitutions on the authority of the convention, according to the usual custom in our early national history. Since 1890, e. g., five states ² have, without the use of the referendum, adopted revised constitutions. (5) The most radical change of this sort was made by the adoption of the initiative in amendments to the constitution, started by Oregon in 1902, and taken up by Oklahoma, in its new constitution, 1907, and by Missouri in 1908. (6) A legislature may authorize a referendum so as to obtain

¹ South Dakota, Utah, Oregon, Nevada, Montana, Oklahoma, and in 1908 Missouri and Maine.

² Mississippi, South Carolina, Delaware, Louisiana, Virginia.

from the electorate advice as to whether or not a proposed bill, or a particular candidate, has popular approval. This is a form of instruction, but it is not legally binding on the legislature. Party primaries may use the same system so as to suggest suitable candidates for office.¹

In this connection it may be noted that the purely local use of the initiative and referendum, especially the latter, the occasional use of the referendum in general legislation, and its use in the adoption, revision or amendment of state constitutions are familiar, long-tried and well-established methods of legislating with the aid of the electorate. The general use of the initiative and referendum in statutory legislation, and the use of the initiative in amendments to the constitution are new to the American system, obviously borrowed from Switzerland, and are still on trial in popular estimation. Few states have so far ventured on the experiment, and these with one exception are west of the Mississippi, where a more radical type of democracy prevails than can be found farther east. The advisory referendum is new, and may develop into a legalized method of giving instructions to delegates or representatives. Evidently no dogmatic statement in respect to the outcome of this tendency toward direct democracy can safely be made at present. The western states, with fewer precedents and more democratic conditions, can experiment with new devices in governmental machinery, the very thought of which would horrify the conservative East.

¹ Illinois, Texas, Oregon and Massachusetts among others have made use of this form of referendum.

If, however, these experiments prove useful, they will undoubtedly be taken up in milder forms by other commonwealths. In this way real improvements will slowly work into the governments of the several states and ultimately become the law of the land. It may be observed that, so far as the initiative and referendum are concerned, there seem to be no backward steps. Wherever the system is on trial, it seems to be gaining rather than losing ground.

New Zealand is by no means a great state, nor even in itself a colony ¹ of international importance, yet within its borders most of the radical experiments in democracy that utopians have dreamed of for generations are at present being carried on. This group of islands is comparatively small, having an area about that of Colorado or Nevada. Its population, all told, is less than a million, not so many as may be found within the borders of Connecticut. The chief occupations of its people are farming and grazing, supplemented by manufactures and mining. It has its commerce and is in close touch with its neighbors in Australia, twelve hundred miles away, and with the mother country, which by the prestige of its flag shields its offspring from many international complications and burdens. In this remote corner of the earth, freed from the fear of war, with natural riches and a population over ninety-eight per cent British by birth or descent, with the suffrage in the hand of every adult man or woman, and a flexible system of government, virtually autonomous, English individualism is free to work out

¹ It is, since 1907, the Dominion of New Zealand.

a form of democratic activity which, if it proves successful, will become a sort of ideal to which other democracies in future may seek to attain.

Without commenting on the success or failure of its numerous experiments in legislation, in respect to which references for reading will be found at the end of this chapter, attention may be directed to what may be called the newer democracy. Adult suffrage is allowed a free hand by careful provisions for free nominations, the Australian alphabetical secret ballot, effective corrupt practices acts and a half holiday for workers on election day. Civil service rules, non-partisan politics and official responsibility help toward honest administration. The government owns its railroads, manufacturing its own cars and locomotives; it owns steamship lines, telegraphs, telephones, coal mines and savings banks, a parcels post, a national bank and a loan office which lends money on easy terms and low interest to the citizens. It plans for ultimate state ownership of lands, helped on by a lease system and a graduated land tax. There is a government insurance company competing with private insurance companies and a governmental management of trust estates. All these and other similar undertakings illustrate the bewildering variety of activities carried on by the state. It arbitrates disputes of all sorts, guaranties land titles, simplifies law, furnishes legal advice and service free or at low rates, serves as tourist agent for travelers, establishes model farms and teaches scientific farming. It uses the probation system for juveniles, colonizes its unemployed, starting them in business as farmers, pro-

vides pensions for the aged and is seeking to abolish pauperism altogether. It serves as selling agent for its farmers, keeps their goods when necessary in cold storage and sells them in London, charging only commission at cost. It aims to establish a minimum wage, a short-hour day and guaranties work for all through its labor department. It has eliminated sweat shops, carefully regulates the labor of women and children and has efficient sanitation laws for manufacturing establishments and shops. It directly employs its own force in the construction and maintenance of public works, and stimulates industry on the part of its workers by coöperative methods. It is abolishing the slums by inducing urbanites to move toward the outskirts and into the country, and by helping workingmen to build homes by loans at low interest. Education is emphasized and is for the most part free. There is no state church, and no state aid is given to any religious body. The government seeks definitely to equalize opportunity for all, to diffuse wealth and to discourage the rise of millionaire fortunes. Its ideal is a land of plenty without pauperism or excessive luxury, where healthy bodies and well-trained minds may become normal and furnish the basis for continued prosperity.

Whether this experiment in democracy will succeed is still a problem. Certainly the economic and racial conditions of New Zealand are favorable, and its safety from international complication seems assured. If its government plans wisely on the basis of a carefully prepared and well-balanced budget, and strengthens in every possible way the morality and intelligence of its

citizens, there seems no inherent reason why it may not become "Newest England" in a large and prophetic sense.

After a survey of political evolution and differentiation, he would have a difficult task who should try to estimate with any completeness the relative contribution of the world's great historic states to political civilization. Yet it would be easy enough to see that in India, in Egypt, on the plains of China and of Mesopotamia and in the cities and harbors of Asia Minor, there developed great patriarchal and commercial empires which fixed the fundamental type of state for civilized man; and that, notwithstanding the rise and fall of dynasties and races, the petty states of early Europe inherited from the East and the South all that was really valuable of a decadent civilization.

In Phœnicia, the most modern of ancient Asiatic governments, and in Carthage its great colony, in Greece and in Rome, centered the contributions of preceding ages, as each, one after the other, assumed prominence and made its own offering to the common stock. From the first three came that emphasis on commerce and colonization, which makes a modern Englishman feel perfectly at home as he reads of the expansion policy of these nations; Athens, in addition, taught philosophers how to reason about the principles of government and to work toward higher and better standards of political life. The genius of Rome lay by contrast in its emphasis on law and administration. By the aid of Greek philosophy it enlarged its customary law into a code that

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will stand for many future centuries, as the high-water mark of attainment in respect to civil rights. By its administrative and centralizing capacity it developed a system of political organization that finds its best expression to-day in the imperialistic hierarchy of the Roman Catholic church, and in the highly centralized governmental organization of France. From England in later centuries came an efficient judicial system, a successful colonial policy and a parliament working out through a joint cabinet an harmonious coöperation of governmental and civic interests. France, a true daughter of the Roman empire, as shown by its capacity in war, in law and in administration, came to the front in the eighteenth century, set fire to the dry tinder of European politics and intoxicated the political world with the inspiration derived from the "Marseillaise," the pursuit of glory, and the ideals of democracy contained in the motto, Liberty, Equality and Fraternity. This influence spread through western and southern Europe, passed to the Latin colonies in South America, rivaling there the competing influences of Spain and the United States, and even affected in the latter country the policies of such democratic leaders as Jefferson and Monroe. Germany and Japan are adding their contributions to the world-state in the form of applications of scientific principles to governmental functions and organization, thereby overcoming natural handicaps. The United States also is no mean factor in the modern political world. From it has come the federation, the written constitution, a humanitarianism cosmopolitan in its scope and a wide application of the principles of democ-

racy. This development has been greatly aided by its freedom from military necessities, its system of general education and the inventive capacity of its people, devoted to the development of a large, well-watered, fertile land rich in fuels and minerals. Through these the nation, with its composite racial population, is deeply impressing its governmental type on the political systems of the world, and has by no means yet reached the height of its powers.¹ Add to all these the many experiments being made in odd corners of the earth, such as in Australasia, Finland, Scandinavia and Switzerland, and the conviction might readily grow that the state, in its governmental functioning and organization, is still plastic, is still adapting itself to newer conditions and by steady improvement is becoming unquestionably the great agency through which humanity will continue to accomplish its ends of social development.

From this discussion of the organization of the state, it seems clear that the present trend of government in the progressive part of western civilization is toward democracy, and, therefore, toward an increasing emphasis on law and on the rights and obligations of citizenship. A brief exposition of each of these subjects will make more evident the spirit, and the conditions essential to the development of an intelligent democracy.

¹ Note, e. g., "The Americanization of the World," 1901, W. T. Stead.

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PART FOUR
LAW AND CITIZENSHIP

CHAPTER XI

CLASSIFICATION OF LAW

IN any community there will develop set and customary ways of carrying on social activities. Persons soon realize that time is saved and friction avoided by conforming their actions to social standards and routine. Such customs develop in all ages and in all kinds of social life, whether economic, domestic or religious. They form a sort of unwritten code, enforced by parental and ecclesiastical authority or by the pressure of public opinion. Some of these customs, however, may become so important for general welfare that stronger pressure than social authority or opinion must be brought to bear on those members of the community who incline to acts in violation of social standards. Whenever a community in its collective capacity, presumably acting through its body of elders, its government, undertakes to apply such pressure, by fixing penalty for violation, then such customs cease to be purely social and become political. In other words they become the *law of the land*. They are virtually commands, ordering or prohibiting certain actions, and disobedience is followed by the infliction of a penalty fixed by the governing body of the community. As the sphere of governmental activity widens, other social cus-

toms become of general importance, enforceable under penalty by the state. Throughout the entire history of the state, laws have developed in this manner from customs. These, arising from social intercourse, are at first largely personal and local; some in process of time develop general importance, and when really essential, are enforced through government for the sake of the general welfare. Law, therefore, may be defined as the formulated will of the state, enforced by the sovereign power of the state. This will may be formulated in customs having a legal sanction, or in commands written or unwritten.

If all law were purely social custom, violations would be few and punishment rare; but other sources have contributed to the multiplication of laws and these have greatly complicated the legal system. Broadly speaking, there are four such causes: In the first place, civilization has been marked by a constant series of wars, conquests and amalgamations of races. Conquerors and conquered settle down in the same community; their differing customs clash and compel ultimate compromise, but meanwhile the dominant race enforces what seems to the conquered a harsh and arbitrary law which they hate and violate whenever possible. Again, the origin of private property multiplied enormously the possibilities of disobedience to law. Social philosophers have tended to decry private property as the root of all evil; Plato in his "Republic" and Sir Thomas More, in his "Utopia," for instance, charge to its existence nearly all the evils of social life. It is certainly hard to find a sound ethical basis for the ex-

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tremes of wealth—excessive riches and abject poverty. Many persons, therefore, have always found it easy to justify to themselves theft and robbery. This is as true to-day as it ever was. The largest part of criminal law is aimed at such crimes, and much social friction arises in consequence. In the third place, society, through the institution of private property, has regularly tended to develop classes, superior and inferior, governing and governed. The class in possession of governmental power naturally arranges the social and economic system chiefly to suit its own interests, and seeks to compel obedience to its mandates even by harsh measures if necessary. Class legislation, therefore, giving special privileges to a favored part of the community, is obnoxious to the others, who violate its injunctions without compunction whenever possible. Lastly, legislation by lawmaking bodies has not always been wise and judicious. It may be too paternal, may interfere too much with personal comforts and rights, and may irritate by petty exactions and overofficialness.

To the governed, an aggravation of the legal system lay in the fact that for long periods a knowledge of the law and of its procedure was considered to be a privilege of the ruling class, who thereby were able to hold hidden terrors over their unwilling subjects. The history of the ten tables of Roman law illustrates this point. The injustice of inflicting penalty under such conditions is obvious. Ignorance of the law excuses no one, to be sure, but if ignorance is compulsory we feel that it should excuse. For this reason civilized communities have regularly demanded that enforceable law be proclaimed.

The demand "That every man may know the law"¹ has been satisfied in most modern states, even though the complexity of civic life is such that few men can understand it when announced. A favorite dream of social utopians has been that law be made so simple that even the unlearned man may understand.² That reform is still for the future.

The customs that first passed into law were probably those concerned with crime against the community as a whole, the beginnings of modern treason laws.

The law of treason.

A law against treason is primarily based on the notion of service owed to a community by its members, or on the allegiance due from a subject to a ruler. Law against treason in some form or other is found even in crude and primitive communities. Severe penalty was inflicted on those who failed in military service or obedience, or who conspired against the community or its head. As kingship developed, treason became personal. It was a crime against the head as the embodiment of the state. When kingship was hedged about with notions of divinity, it became not simply traitorous but impious to lay hands on the "Lord's anointed," and spiritual as well as temporal punishment was meted out to the offender. Torture, confiscation of property, corruption of blood and ecclesiastical censures were rigorously inflicted on malcontents. The idea of treason was extended so as to protect members of the king's family or his chief officers, and so as to include

¹ Note for example, explanation in Jenks, "Law and Politics," pp. 10-11.

² See for illustrations More's "Utopia," p. 135, Morley edition, and Gardiner's "Constitutional Documents," p. 240, Section 6.

even words or criticism that might seem to imply hostility to the king and his government.¹

In modern states, as autocracy and the divinity of kingship become obsolete, treason consists in action against the state as well as against the king. Punishment of the latter class of offenses becomes more humane as kings lose their importance in the political system. In republics treason against the head of the state or his officers is no longer recognized as a special crime; offenses of that sort are treated under ordinary criminal law. Treason now is a crime only when directed against the state. Furthermore, as freedom of speech is essential to democracies, the tendency is to consider as treason only armed rebellion and not criticism of the state or its officials. These several varieties of treason laws can easily be illustrated by comparing the systems in states differing in political development, such as China, Russia, Germany, Great Britain and the United States of America.

As already mentioned, acts of violence and theft were long considered to be private matters, of no concern to the state, and were settled in accord with the social customs of the community. Regulation, therefore, was social, domestic, religious but not civil. As the state began to enlarge its importance and to regulate all disputes that tended to disturb the peace of the community, necessarily it had to adopt a code of law as the basal principles for decisions. The customs of the community based on primitive customs

Criminal
and civil
law.²

¹ See, for example, Feilden's "Constitutional History," pp. 3-7.

² See Chap. iv, pages 80-87.

and prohibitions (the tabu) supplied such a code, subject to such modifications as from time to time became necessary. In this way developed ordinary criminal law, which names the various prohibitions enforced by the state, and specifies the penalties to be inflicted in case of violation of the law.¹

In the same manner developed rules and regulations in regard to property rights. When property became private, not communal, regulation of rights became increasingly important. Disputes in regard to ownership often led to violence, and in its function as the guarantor of peace, the state had to assume an increasingly larger share in the settlement of disputes in regard to property rights. This jurisdiction, however, is not so marked as that exercised in criminal matters. In case of crime the state assumes charge of the matter and treats the offense as one committed against the entire community. The state prosecutes, not the injured person, and the state bears the expense of investigation and inflicts the penalty. A civil dispute, on the other hand, is in form private. It is a dispute between individuals, who voluntarily bring their contention before the state as an umpire, which will decide in accord with well-established law, and enforce its decision at the expense of the parties concerned.

An important historic form of law is the decree or ordinance. This is supplementary to the law of the land and is formulated through the executive and the departments of administration. If in a state there is no

¹ See article *Popular Science Monthly*, vol. xvi, p. 438, by W. W. Billson, "The Origin of Criminal Law."

lawmaking body, the power of the executive to issue decrees or ordinances is most important, supplying as it does the place of the legislature. In statutory legislation no law can fully cover all possible details, and hence there regularly rests in the administration the power to make supplementary rules and regulations for the guidance of the several administrative departments. These rules are readily changed or modified to suit conditions. They are the *by-laws* of social organizations. The ordinance power of administrative departments is always large, but is especially emphasized in states not of the Anglo-American type.¹ Legislation in those countries is expressed in a concise and terse manner, and its details are left to be worked out by the administration under the guidance of the executive. This naturally enlarges greatly the importance of administrative departments. In Anglo-American countries, on the other hand, legislation is detailed and verbose to the last degree, in that the legislature seeks to anticipate every possible emergency. The ordinance power of the administration is correspondingly reduced. Such ordinances of administrative bodies are related to administrative law proper as statutes are to the constitution. They elaborate the fundamentals of the higher law and supplement it. City councils being practically administrative bodies issue their decisions as ordinances, and as cities are known as municipalities, these ordinances are frequently referred to as municipal ordinances.

¹ For a thorough comparative study of administrative systems in Europe, see Goodnow's "Comparative Administrative Law," vol. i, "Organization," vol. ii, "Legal Relations."

Differentiation in government has resulted in a corresponding differentiation in law. The fundamental law of the land, or law of the constitution, is the basis for all law, but derived from this is the ordinary law of the land, the civil law, which applies to all citizens or quasi-citizens in their civic capacity. Side by side with this is the law regulating those who serve in the army and navy. It is a form of administrative law and applies ordinarily to those only who are actively engaged in military and naval services. Yet in times of war or insurrection, the provisions of the civil law may be suspended as far as is necessary, and the more expeditious rules of war employed so as to secure the peace and safety of the state. The method by which this may be done is part of constitutional law. The state, besides employing the services of those in the army and navy, has many persons engaged in the ordinary administration of governmental affairs. These unitedly make up the civil service, as distinguished from the military and naval service. The rules and regulations governing the organization and powers of the civil service form the administrative law. This division of law is a formal one in English-American systems, but has attained a much higher development in the states of continental Europe. In France, for instance, where this law has reached its fullest development, there is a special series of administrative courts, independent of the civil courts, having jurisdiction broadly of all cases involving acts of officials of the civil service, and cases arising under administrative law. The argument in favor of such a system is that it insures

a more scientific, expeditious and impartial decision than would result if the case were intrusted to the ordinary courts.¹ In the English-American system there are special courts for the consideration of administrative disputes, but their decisions are subject to revision by the civil courts, which also have jurisdiction over civil officers. These courts make no distinction between administrative and civil law.²

It has already been said that every state has a body of fundamental law known as its *constitution*. This term may then be defined as that fundamental law or body of laws, written or unwritten, in which may be found (a) the form of the organization of the state, (b) the extent of power intrusted to the various agencies of the state and (c) the manner in which these powers are to be exercised. Utopian constitutions may be worked out by social philosophers as ideals in political development. In Greek classic times philosophers not infrequently undertook to write out on request, model constitutions for particular states; and Aristotle, in preparation for his famous work on "Politics" gathered together, it is said, the constitutions of some two hundred and fifty states. In other words, he had prepared for him a statement of the fundamentals of the governmental systems of these several states. Similarly the constitution of any state can be studied and set forth by any competent person familiar with the political system of the state in question.

¹ See pages 170-174.

² For studies of American administration, see Bibliography under names Fairlie and Goodnow.

A confusion, however, arises in modern times owing to the introduction of the written constitution. This formal document theoretically contains such fundamentals only, as should be found in constitutions. In fact, however, for reasons unnecessary to explain here, written constitutions seldom if ever contain all the fundamentals, and may embody many matters of minor importance. In the United States of America, for instance, the national written constitution would give an intelligent foreigner a somewhat vague comprehension of our constitutional system. He would need to supplement his knowledge by such information as is contained in Bryce,¹ and in some treatise on the constitutional law of the land. On the other hand, if he desired to understand the constitutional system of one of the commonwealths by a study of its written constitution, he would be overwhelmed by the mass of petty detail of local and temporary importance contained therein. Yet these written formal documents, from the legal standpoint, must be treated as the fundamental law of the state or commonwealth, with which no custom, ordinance nor statute should conflict. In states, therefore, having written constitutions there is the possibility, and even the necessity, of two lines of constitutional study—namely, the study of the written document as the technical, fundamental law, and the study of the constitution as it really is, that is, made up partly from the written and partly from the unwritten fundamental law of the land. This complication, while unfortunate, is after all not in practice serious. Familiarity with the

¹ "American Commonwealth."

notion of a constitution enables one readily to add to the written document whatever is needed, subtracting from it at the same time whatever is petty and local in character.

The rise of a separate body for legislative purposes in governmental systems results in a form of law known as the statute or the act. This is presumed always to harmonize with the fundamental or constitutional law, applying its principles to the changing conditions of political life. In federations there will be a dual series of statutes or acts: those of the national lawmaking body and those of the several commonwealths of the federated state.

In the development of English-American law an important distinction has arisen between common and equity law. A decision based on custom may prove to be in itself unjust. A moral or just custom of one age may prove to be the reverse a few generations later. If a state aims to secure justice it may rectify unjust decisions by authorizing some person, as the king, to correct the error in a particular case. This is the basis of the pardoning power of the executive, who by its exercise may temper justice with mercy, or at any rate with expediency. A special form of this power developed in England when the king authorized the lord chancellor, who in those days was regularly an ecclesiastic and the king's spiritual adviser, to soften the rigors and to amend the defects of the common law by the introduction of equitable principles. These he derived from his knowledge of Roman and canon law and classic philosophy. From these there de-

veloped a system of equity law, which for centuries flourished side by side with the common or customary law of the land. As the decisions of equity courts are in effect orders of the king or executive, they are technically known as decrees, not as decisions. These two systems of law, with their separate courts and procedure, are slowly amalgamating, and in certain of the commonwealths of the United States of America have been merged into one definite system.¹

When the church played an important part in political life, and had jurisdiction over many matters now exercised by the state, it evolved from custom
Canon
law. certain rules and principles that became the basis of an ecclesiastical law. Such law is still politically important in those states closely identified with the church. The Christian church in its connection with the Roman empire worked out, largely from Roman law, a *canon* law, regulating ecclesiastical polity and activity. The influence of this law is still felt in such functions as have passed from ecclesiastical to political control, as, for instance, marriage, divorce and relationships. Canon law itself has at the present time small political importance. In the same manner can be traced in the law of the land many survivals of other codes that once were private rather than public, such as, for instance, once centered in paternal authority, or in the law-merchant and guild customs of economic life.

States in their intercourse one with another have too often lived in a condition of continuous war, the only

¹ For a list of these, see "Our State Constitutions," pp. 39, 40, by the author.

peace being that which follows devastation. But civilized states prefer peace, and in the pursuit of it have developed a system of rules and regulations known as international law. This is not law in the sense that it is enforceable by the state. It is a collection of customs, ethical standards and rules agreed on by general consent. Its chief principles are founded on the practices of great states, and enforcement depends on the pressure of opinion and the fear of war in case of violation. Its modern development dates from the time of Grotius (1583-1645), who, in his "*De jure belli ac pacis*," set forth its principles, derived from analogies in Roman and natural law, and from the practices of nations.

Akin to international law in origin is admiralty law, which deals with cases, civil and criminal, that arise in connection with commerce on the high seas and prize cases in time of war. Obviously, customs arising on land could hardly apply to such matters, and a system of law has been developed from principles of ancient maritime codes, Roman law and analogies derived from common law.

There is an important distinction between what is known as public and as private law. Whenever the interests of the state as such are involved, the law bearing on such interests is part of the public law. Whenever the interests at stake are primarily individual, the law is private law. International law, so far as it concerns the interests of states, is public; but so far as it concerns the interests of individuals who happen to be subjects of different states, it

Inter-
national
law.

Public and
private
law.

is private. The law regulating the property rights of individuals is private; but criminal law is a branch of public law, as also are the branches of administrative and constitutional law. In other words, public law is that in which the state is itself directly and primarily concerned, while private law regulates the relations of individuals one to the other. A distinction is sometimes made between international law, which is, technically speaking, not law but custom, and that law which affects the internal interests of the state. This is often referred to as municipal law. Municipal public law and municipal private law are both the law of the land in that they are both sanctioned and enforced by the state. International public law, as already explained, is sanctioned and enforced only by international public opinion, guiding itself by the customs and precedents of states.

A common law system, such as that employed by English-speaking peoples, is based on custom as determined by precedent and judicial decision. Roman law in its development was also a common law system. The codification of Roman law under Justinian suggested to modern states the idea that the law of the land should be embodied in a definite code systematically arranged and formally written, as the final authority for judicial decisions. The respective merits of these two systems of law are still a matter of debate. The code system is in use throughout the civilized world except in English-American countries. In the commonwealths of the United States of America there are approximations to the use of a code in (a) the consolidated statute, that is, the incorporation into one

Codifica-
tion.

general enactment of all the statutes relating to a particular branch of the law, and (b) in the codification of particular branches of public, but rarely private, law.

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CHAPTER XII

LAWMAKING OR LEGISLATION

The Growth of Law

It is hardly necessary to say again that laws in the beginnings of political life were not made at all in the modern sense; they grew out of well-recognized customs and long-standing habits of mind.

Unchang-
ing law.

Naturally, in savage or nomadic life many customs would seem even more ancient than they were to men whose memory of things seldom went back of three generations. When codes of laws were memorized and handed down by tradition, as so frequently was the case, or when the invention of the art of writing supplemented the memory of man, far greater fixity and conservatism were possible in both law and custom. Hence ancient political systems of the patriarchal type always assumed that the law of the land was permanent and immutable, like the "law of the Medes and Persians, which altereth not,"¹ or the ancient and long-standing customs of England, tracing back to a "time whereof the memory of man runneth not to the contrary."² Founded on traditional custom as ancient law was, and in a static civilization, it seemed changeless and divine. Only impious

¹ Daniel vi, 8.

² See Blackstone's "Commentaries," Introduction, Section 3.

hands would dare to alter sacred customs ordained and sanctioned by the gods. But no set of customs is sufficient to meet the minute requirements of everyday life, and hence there has regularly been a sort of necessity for a periodic modification of the old and introduction of the new. There are several processes whereby such changes were accomplished.

A fundamental and prolific source of change arises from conquest. The history of civilization is one long series of conquests and compulsory amalgamations. Every subjugation implies modification of custom. Neither party can maintain its own customs intact. Some are ruthlessly suppressed, others modified and others, again, slowly assimilate through unconscious imitation. Similarity of environment also tends to produce uniformity of custom. Such processes are always going on in human experience, and numerous illustrations of it in modern times will readily suggest themselves.¹

Again, no matter how static a civilization may be, no generation has just the same environment as its predecessor, nor do its people interpret customs exactly as did their ancestors. Hence by a slow and gradual process changes creep into the law, unheeded and unknown except as comparisons can be made at intervals of several generations. This tendency may be supplemented by formal interpretation of the law and by the aid of the *legal fiction*. Judges in all ages, in their anxiety to satisfy their sense of justice, will strain the meaning of the law on the assumption that the law

Change
through
conquest.

Change
through
interpreta-
tion.

¹ For instance, in India, in Alsace-Lorraine.

intends to do right but happens at times to be somewhat unfortunate in its phraseology. This belief in the inherent justice of the law leads in all ages to the introduction of legal fictions, so marked in their influence in the development of Roman and English law. The fiction assumes a thing to be true in law which is plainly not true or is probably false. The end always must be justice, not injury, so as to satisfy the spirit of the law. Numerous illustrations of legal fiction still survive in modern legal systems, but its importance as a modifier of law has been superseded by legislation.¹

Akin to interpretation is the influence exerted by learned commentators of the law. Every legal system, whether secular or religious, develops a body of learned men who devote themselves to a close philosophic study of the law. The judge seeks to apply a principle to a case, but the jurist seeks to ascertain the principle involved in the law, and to harmonize it with broad ethical principles. They may, of course, go too far in their search for principles and may find them on the point of a needle or in the crossing of a *t*, but such casuists do not exert a permanent influence. A jurist, however, who with reason and lucidity shows the inner meaning of law in its relation to a larger sphere of life, is always listened to with deference and his opinions gradually influence the reasoning of other jurists and judges. In this way the profound wisdom of eminent Roman and Anglo-American commentators deeply influenced the development of those systems, as their ideas

¹ See S. E. Baldwin, "The Decadence of the Legal Fiction," Chapter VIII in "Modern Political Institutions."

became slowly assimilated to the legal knowledge of their times.

Codifications of customs have proved to be a great source of innovation, and many of them have been important in the development of civilization. The oldest extant is that of Hammurabi,¹ dating back to 2285-2242 B.C. The codification of Hebraic custom contained in the pentateuch is familiar to most of Christendom. The Orient has many codes, a knowledge of which is becoming increasingly common in western civilization. The twelve tables of Roman law and the codification of Justinian mark two great epochs in legal history. Teutonic and Celtic codifications are numerous and form important landmarks in early European history.² In more modern times the code of Napoleon and the recently adopted codes of Germany and Japan are typical in character and importance. Codifications arise from several causes, chief of which is the conflict of rival interests and resultant compromises. In the process of subjugation the conflicting customs of conquerors and conquered may result in a codification of customs in order that each may know the other's law; ultimately a compromise may formulate a statement of what law shall be enforced in the community. Class struggle or revolution within a state may in a similar manner result in a compromise that may be formally expressed in a definite code, at times partaking almost of the nature of a treaty between warring parties, as, for

¹ See Harper in Bibliography.

² See for illustrations, Jenks, "Law and Politics in the Middle Ages."

instance, the ten tables of Rome and the Magna Charta.¹ Codifications may also be due to important changes in the internal conditions of the community, or to a scientific desire for a clearer statement of existing law, especially when it is complicated by a conflicting mass of interpretations due to the lapse of centuries. The invention, also, of the art of writing seemed to result in codifications of law as an aid to memory.

Codifications are important in the history of legislation because they are in effect real legislation. No codification can be an exact statement of all the customs at that time enforceable by the state. Some will be omitted from the written statement, changes may be made inadvertently or intentionally and perhaps even important provisions added. In former times the fact that a thing was written gave sanctity to it in general estimation. A written code, therefore, becomes a sort of sacred law, not to be tampered with by profane hands, each word of which has a weighty meaning. Development, therefore, inevitably takes place through interpretation, aided by the legal fiction, and this process may go on for centuries. Roman law, for instance, at the height of its development was theoretically supposed to be identical with the law of the twelve tables, just as the English common law of to-day is supposed to be the same in theory as that formulated centuries ago in the Magna Charta and the judicial decisions of the thirteenth century. The so-called "worship of the constitution" in the United States of America presents the same phenomenon. This document has in

Codifica-
tion a sort
of legisla-
tion.

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¹ Note, for instance, Section 61 of Magna Charta.

form changed but slightly in the last hundred years, but its makers would have difficulty in understanding its modern meaning as reached through interpretation. Similar illustrations might be made from the numerous creeds that regularly develop from varying interpretations of inspired writings. In other words, the phraseology of the code becomes a reservoir of an infinity of meanings, and each generation selects from the storehouse such interpretations as suit the conditions and ideals of the times.

In all these possibilities of change in existing law, the underlying assumption was that the law was the same, unchanging, inherently divine and fundamental to civic welfare. But there developed in the executive a power that practically amounted to the formulation of new law. As head of the state, the fountain of justice and the brain of his people, the king was supposed to watch over the interests of the community and secure its welfare. In so doing he issued decrees, ordinances, proclamations calling attention to the law, supplying its details and making application of it to existing conditions. In this work he was, of course, aided by his council, which, by the wisdom and experience of its members, gained influence in governmental policy. The decisions of king and council plainly could not and would not always conform to the strict letter of the law. New conditions demand new theories, and under color of the old the king would decree the new. An entirely new condition would necessitate an entirely new law, itself divine in origin as emanating from a divinely appointed ruler. In this way executives

Lawmak-
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through
the ex-
ecutive.

gradually assumed the right to modify ancient customs and make new law when need demanded.

The same theory would apply to the assemblies of democratic city states. These were not supposed to alter the existing constitution, but in practice, in what we would call the exercise of police power, they often initiated new legal principles which would themselves seem to be, before many years had elapsed, ancient and long-standing customs. In modern systems the royal council, as already explained, has developed into a legislative body whose acts when approved by the executive become law. But the ordinance power of the latter department still survives and is exercised in all states. In relative importance it yields to legislation, which it is supposed merely to supplement. If necessity, however, should demand, this ordinance power of the executive becomes of the utmost importance; in times of crisis, in the form of war power, police power or prerogative, it may temporarily even supersede the ordinary law of the land. The Roman dictatorship furnishes a peculiar form of such temporary despotic power in the executive, and also illustrates the fact that legal irresponsibility during the crisis is regularly followed by accountability with the return of peace.

Modern legislation is not the result of a system carefully planned in advance and put into operation by wise statesmen. Rather, it is an accidental growth and the result of numerous petty matters of small consequence in themselves. When the English crown in the thirteenth century summoned unwilling delegates from the shires and boroughs to meet

him for the discussion of money grants, it was merely a tactful device to obtain larger grants in a more expeditious manner. It was a small thing to give in return some slight favor petitioned for by the delegates. To be sure, these petitions began to come as a matter of course when the delegates met in session, and the requests were increasing in importance, but promises were easily made when much-needed money was in sight. It was a little more serious when royal promises had to be fulfilled before the grants were made, but it was hard to refuse under the circumstances. Yet a century or two of this sort of thing set precedents for later centuries, and it was natural enough that a body of delegates representing constituencies rapidly increasing in wealth, intelligence and importance should enlarge from time to time the scope of their petitions. When the issue was fairly joined in the seventeenth century, and the Stuart kings awoke to the fact that the house of commons did not really believe in royal supremacy and divine right, matters had gone too far to be checked. The beheading of Charles I and the dethronement of James II taught the Crown that a petition of the House was a command, couched in respectful terms. In this humble way developed modern legislation, a most powerful and effective device for the abolition of the obsolete and the establishment of the new, as France learned in the eighteenth century.

Modern legislation does not profess to be a mere interpretation of the law, but boldly proclaims that it aims to formulate new law. The introduction of this method of lawmaking is the deathblow to enlargement of law

by legal fiction, interpretation, equity principles or royal ordinance. Circumlocution becomes no longer necessary, for a legislature has but to pass a statute embodying needed changes and the thing is done. The older devices are of use only when legislation is impossible. In times of sudden crisis ordinance power comes to the front. With a written constitution virtually impossible of amendment by legislation, as is the constitution of the United States of America, interpretation must be relied on. But these devices rapidly pass into disuse as legislatures obtain control of lawmaking and meet frequently for the consideration of possible changes. To be sure, there are natural limitations to this apparent omnipotence of legislatures. After all, only those laws can be enforced which conform to the customs and practical ideals of social life. New law must suit conditions or it proves ineffective. An unscientific law may involve some alteration in human nature and a statesman will hesitate long before he attempts that. Then, too, incompetency and corruption on the part of legislatures inevitably result in a lessening of their powers, and consequent increase in the powers of the other departments of government. Yet, after all is said, modern legislation is a most powerful addition to governmental machinery, and when rightly utilized can become productive of much good in the state.

These several tendencies in legislation point to a time when legislation will be far more scientific than it is at present. American lawmaking bodies formulate entirely too many rules for petty and routine matters, which might more wisely be left to administrative bodies.

Much hasty legislation could be vastly improved if legislators were more familiar with the experiments and experiences of other lawmaking bodies. Bureaus for the study of comparative legislation, like that of New York, the legislative reference bureau developed by Wisconsin and commissions appointed for the special study of important topics are steps in this direction.

But really scientific legislation is as yet an ideal to be attained. The fault found with legislatures is chiefly due to their failure to satisfy the ideals aroused by the optimistic democracy of the eighteenth century. We all have to admit the truth of Spencer's denunciation of the "Sins of Legislators"¹ and of the perennial criticisms of American legislation. There is a vigorous demand that legislation be wiser, and that it emphasize permanent general interests through a knowledge of the laws of human nature and social development. Jeremy Bentham (1748-1832) voiced this demand for the nineteenth century in his "Theory of Legislation."² Sociological studies will make possible for the twentieth century a still wiser theory.³

Legislation is too largely prohibitive in kind, aiming to suppress by threats certain supposed evil tendencies in human nature. The doctrine of human depravity is not so popular as formerly, and the question arises whether threats of punishment are really efficacious in

¹ See "Man Versus the State." Also discussion of this topic by Ritchie (Bibliography).

² Edition, 1871. London.

³ See for a suggestion, Ward's "Applied Sociology," pp. 337-339.

preventing crime. Men are more easily influenced to do right than intimidated from wrong. The principles used in horticulture and stirpiculture indicate the method to be followed in scientific legislation; we should assume that there is much potential perfectibility in human nature. Social conditions should be so adjusted as to assist in the development of this; evil tendencies will thereby atrophy from disuse. Preventive, probative and reformatory methods are cheaper and wiser in the long run than punitive. The principle of self-interest can be appealed to in such a way as to foster respect for law, not disregard of it. The beginnings of such legislation may already be seen in laws already formulated, and illustrations are not hard to find. The necessity of raising taxes without too much friction has sharpened legislative ingenuity so that there are many scientific elaborations of laws in regard to taxation. The taxation of luxuries as against necessities, for example, or a slight discount for prompt payment, illustrate this. The probation system for petty offenses and the reduction of terms of imprisonment for good behavior prove efficacious in reducing crime. If illegitimacy is common through the heavy expense of a formal religious marriage, the legalization of a civil marriage at nominal cost largely reduces the per cent.¹ A wise divorce law proves a great aid to social morality, and the Gothenburg license system, through the elimination of private profits, considerably reduces intemperance. The American device of reducing the cost and difficulty of securing a patent power-

¹ This finds many illustrations in the experience of Latin-American governments.

fully stimulates invention. The reduction of the cost of postage is a well-known instance of an aid to commercial and industrial expansion. Many governments stimulate local administrative efficiency by offering to pay part of the expense if a set standard is maintained.¹ Other illustrations will readily suggest themselves.

The success already achieved along such lines gives hope that legislatures may in time become intelligent enough to formulate such legislation regularly. Plato said² that perfect government would come when wise men legislate or legislators become wise. An unintelligent democracy is like a rudderless ship, for scientific government above all things requires an intelligent public opinion; but this condition depends on the growth of general scientific knowledge, political intelligence and civic patriotism.

When legislation has been passed by a lawmaking body and sanctioned by the executive, its provisions presumably must be observed throughout the state. But such legislation may be in violation of the letter and spirit of the constitution. Under such conditions a department of government or a citizen conceivably might refuse to enforce or to obey the law. Government would soon become a farce unless conflicting interpretations could be settled. The constitution may itself specify what department shall finally decide on the legality of a law; but, failing that, in autocratic monarchies whatever the king sanctions is the law

Legality of
legislation.

¹ England, for example.

² "States will prosper when kings become philosophers, or philosophers kings."

and must be enforced and obeyed. In constitutional monarchies the will of the legislature, approved or even, perhaps, if disapproved by the king, is the deciding factor. In the United States of America, however, both the legislative and executive departments may agree as to the legality of a law and yet when it is brought before the courts as the law bearing on a case it may be decided to be unconstitutional and hence null and void. This decision is final and is generally respected by the other two departments of government.¹ This enormous power placed in the hands of the American judiciary is justified only by the prominence of the judiciary in the English-American systems and the confidence felt in the impartiality of its decisions. The system is not imitated by other states, which prefer to rely on decisions made by either the executive or the legislative departments.

The Written Constitution

Even in the revolutionary period of the United States of America the evils of a too powerful legislature were recognized, and steps taken to provide a remedy. The chief device evolved for this purpose was the written constitution, which represents a new development in legislation. The origin of this idea seems to be twofold:

(1) In all confederations, ancient and modern, there is need of a sort of formal compact, which may or may not

¹ The executive, however, has on several occasions ignored such decisions and enforced its own interpretation of the constitution. See for discussion of this point Willoughby, "The Supreme Court," Chapter VII.

be written, in which will be set forth the aim and organization of the unity and the powers intrusted to it. The same principle is seen in the charters, granted by king, proprietor or trading company to those colonists who settled along the Atlantic coast. The idea also is found in the constitution of the New England colonies adopted by the confederation of 1643-1683, and in the abortive union of the Albany convention in 1754. The essence of this notion is the treaty. Parties somewhat suspicious of one another's motives, yet desirous of securing themselves as much as possible against common dangers and stimulated by the hope of unitary power and importance, form agreements and, for the sake of greater security, place them in writing. This idea is plainly seen in the American constitutions of 1781 and 1789, and finds modern expression in such documents as those of the German empire and Australia. Naturally, the contract theory of the eighteenth century powerfully stimulated the formation of such compacts or contracts in the American colonies.

(2) The second notion involved in the written constitution is that of a check on the powers or possible despotism of government. This idea also derived much of its strength from the famous contract theory of modern times. Its early development in this country may be traced to the Mayflower agreement (1620) and to the Fundamental Orders of Connecticut (1638). The idea can be traced in England from the revolution of the seventeenth century under Cromwell. At that time the radical wing of the revolutionary party insisted that there should be adopted a

As a check
on despot-
ism.

fundamental law, paramount over parliament, containing in it provisions safeguarding the rights and liberties of Englishmen. This demand culminated in the adoption of the first written constitution, the Instrument of Government, which was put into operation in 1653, but was soon modified and finally disappeared at the Restoration.¹ This idea of a fundamental law, however, continued to be discussed in political writings and was well known in America through the works of Harrington and Sydney. It found its way into the early constitutions, chiefly in the form of bills of rights. Then, as the tyranny of legislatures became manifest, Massachusetts hit on the happy expedient of summoning a convention made up of elected delegates, not members of the legislature, authorized to draw up a constitution which would secure popular liberty. By making the constitution alterable, not at the wish of the legislature only, but through a convention voicing the wishes of the electorate, there was secured a law, above the legislature, which could be amended only with the joint consent of legislature, convention and people. From that time the constitutional convention has been a popular instrument whereby checks and restrictions of all sorts may be placed through the constitution on the powers of the several departments of government.

Since the American revolution, the written constitution has become increasingly important as a factor in political development. Its use in political systems is constantly growing, whether in the form of a treaty

¹ See Borgeaud, "Rise of Modern Democracy," and Gardiner's, "Constitutional Documents."

compact or a regulation of governmental powers or of both combined. It passed to France in the revolutionary period, and spreading from these two great centers of political influence, the written constitution has become the form of fundamental law throughout all of Latin America, in Japan and in most of the states of Europe. The written constitution may, as in France, consist of a very few fundamental provisions, too important to be treated as ordinary legislation, or may consist of a practically complete statement of fundamentals, as in the United States of America. In the American system several points are usually emphasized:

Its grow-
ing im-
portance.

(1) The constitution regularly specifies what powers may be used by the usual departments of government and by the electorate. Any powers not so assigned or implied from those assigned are reserved powers, and can only be brought into use by an amendment to the constitution. The advantage of this system is obvious. If the government had full sovereign powers it might easily become autocratic and despotic. But if the constitution specifies just what powers the government may use, it is equivalent to a sort of guaranty that the government will be on its good behavior. No department of government by theory should transgress the bounds set for it; such action would be illegal and revolutionary.

(2) The inconvenience of reserving powers that cannot be used by the government in case of necessity is met by providing in the constitution a set procedure in accord with which amendments or even complete revisions may be made. The length of time needed to

make such alterations gives opportunity for discussion, and the necessity of the change, therefore, must become clearly manifest. If in time of war or great danger a reserved power must at once be brought into use, and the crisis does not allow time to make the necessary amendments, then probably the government would, under the war or police power, exert any authority needed, and after the crisis would presumably revert to former conditions. Then, if necessary, the constitution may be amended at leisure.¹

From one standpoint the most important part of a written constitution is the provision regulating its amendment and revision. If such a provision
 Amend-
 ments. is lacking, then the written constitution hardly differs from a statute and presumably can be amended, revised or repealed by the ordinary channels of legislation.²

In the early American written constitutions such an omission was common, but as the importance of a written fundamental law became manifest, provisions were inserted which authorized the ordinary lawmaking bodies by special procedure to make amendments. This special procedure involved greater deliberation and a larger vote for the passage of amendments, under the theory that a fundamental law should be changed as little and as seldom as possible. As popular democracy developed in the United States of America, it was held that not

¹ Lincoln's emancipation proclamation, followed by the thirteenth amendment, is a good illustration of this process.

² Italy, for example, see Lowell, "Continental Europe," vol. i, pp. 150-151.

merely the representatives of the people but the people themselves should have a direct voice in the making of fundamental law. This brought about the submission of amendments by referendum to the electorate for their approval or rejection. Experience also showed that legislatures were not always eager to initiate amendments especially if such amendments tended to deprive them of power; hence came the further provision that constitutions should be made and revised, not by legislatures, but by a convention especially called for that purpose. As it might be possible for a legislature to refuse to call a convention, or to arrange its composition in such way as to defeat popular demands,¹ provisions were later inserted in some constitutions that a convention should be called at stated intervals, or that a referendum be submitted asking whether a convention should or should not be called, and providing also that, if called, the membership should be arranged on the basis of population. By such devices the convention has in many commonwealths of the United States of America come to be an agency through which the electorate may (1) outline the framework of government and delegate powers to the several departments, and (2) issue mandates to their delegates in the legislature instructing them to pass needed legislation. In this way the constitutional convention has become a most efficient means of enabling popular demands to control legislation. This tendency toward democratic influence has been aided by a lessening of the rigidity of the process of amendment so as to

¹ The Connecticut convention of 1901 is an illustration of this point. See "Our State Constitutions," pp. 88-89.

allow constitutional provisions to be inserted with comparative ease. As a rule, in the commonwealths an amendment may now be passed by a two-thirds vote of both houses of the legislature and a majority vote of those voters voting thereon when submitted by referendum.¹ By contrast, the amending clause of the national constitution is so rigid that the document is practically unalterable. Only three amendments have been made since 1800, and these were forced through during the period of reconstruction.

A written constitution regularly has a preamble or statement of reasons and purposes, an enacting and a ratifying clause and a schedule or section embracing provisions of temporary importance. The constitution proper may contain, in addition to the fundamentals of government, a statement of personal rights in life and property guaranteed to citizens. Such rights thereby become binding on the government and prove a safeguard against tyranny. In the American system the best formal statements of such rights may be found in the constitutions of Massachusetts and Virginia. The length of constitutions naturally will vary with conditions. The bare framework of government can be set forth in a few hundred words, but it may be elaborated in detail for prudential reasons, so as virtually to include everything seemingly important. Details of organization, long series of limitations on governmental powers and mandates of all sorts may lengthen out the document interminably. The Louisiana constitution of 1898, for ex-

Its development in the United States.

¹ See Chapters II and III, "Our State Constitutions."

ample, consists of about forty thousand words. The constitution of the new state of Oklahoma is nearly a third larger. This tendency is not due to a failure to appreciate the distinction between fundamental and ordinary law, but is due to a widespread distrust of the legislatures. These bodies now find themselves limited in power and restricted and regulated in every possible way by constitutional provisions which they cannot override. This tendency, if it continues, will result in making the convention the really important legislative body, leaving to assemblies the power merely to work out in detail the principles set forth in the constitution. In other words, it will become a sort of department of administration especially set apart for the formulation of ordinances.

The convention. In the making of a written constitution, the constitutional convention, an especial body chosen for that purpose, is usually employed. But there are exceptions. England makes no distinction in procedure between constitutional and ordinary legislation. The same body acts on either kind indifferently. In France the bicameral assembly meets as a unicameral national assembly and with special procedure acts on constitutional changes. These are not submitted to referendum. In the national system of the United States of America changes are effected by the lawmaking bodies of the federation and the commonwealths. Such changes, however, are not subject to executive veto, as in the case of ordinary legislation. These illustrations indicate possibilities in the practice of states, but, broadly speaking, the convention, made up of popularly elected

delegates, chosen for the special purpose, is the usual modern agency for effecting changes in constitutions. Two theories have developed in respect to the powers of the constitutional convention.

(1) The convention as an agent of the state is a body of limited powers, and must submit its work to the electorate for approval or rejection.

(2) The convention is the embodied sovereignty of the people, acting for the people and in the name of the people in formulating a just system of government. Hence the convention is for the time being the people itself, unfettered by legislative injunctions and promulgating the constitution when made on its own authority, without reference even to the people.

The second theory was especially prominent in the earlier history of the Latin-American states and in the commonwealths of the United States of America. It was necessarily so in order to counteract the autocracy of legislatures or executives. It is, however, gradually yielding to the other more conservative theory. The convention, as such, is one of the several agencies of the state, called into existence by law and subject to constitutional and, to some extent, even legislative regulation. It has the usual powers of the lawmaking body over its membership and procedure, and has its only function in the revision or making of the fundamental law. The constitution, however, when completed is not submitted to the legislature for approval, but directly to the electorate through the proper officers of the state.¹

¹ For a discussion of differing systems, see Borgeaud, and Jameson.

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CHAPTER XIII

RIGHTS AND POLITICAL PARTIES

Rights Under the State

IN the development of democracy the question of rights has played a most important part. There are two distinct questions involved in the discussion: (1) the theory under which a person may claim rights at all, and (2) the particular rights a person may claim under the state. Historically, rights originate in society, not in the state, and consequently are moral in their nature; but as the state gains power and attains supremacy in social life, a person may legally claim before the law only such rights as the state is willing to grant and to maintain. In well-regulated democracies the state willingly guaranties to its citizens all rights necessary for individual and social development; but in tyrannical and badly managed states, such rights may be denied or ignored; in which case citizens, lacking the essentials for a manly and honorable existence, may become inert, cowardly and base. From the beginnings of history, therefore, there can be traced in all energetic communities a demand on the part of the people that their rights be recognized by the state and guarantied to them by proper governmental regulation and supervision. In primitive hordes and in tribal organizations all members of the community enjoyed,

theoretically, at least, equal rights and equal protection. Under patriarchal organizations distinctions in amount and quality developed along three lines: (1) the social subordination of women to men, (2) the introduction of slavery and (3) social distinctions based on kinship, wealth and education. The culmination of this tendency in autocratic monarchies resulted in a system in which the monarch theoretically acknowledged no rights in his subjects save such as depended on his will and whim. In practice this despotic will was restricted by long-standing customs, by social institutions and by the necessity of securing the good will and support of the dominant part of the community, whether army, church or nobility. The history of tyrannical despots shows, however, to what lengths such a king may go when dominated by evil passions. Reaction against tyranny resulted in a counter movement, in which men, basing their arguments on special privileges, long-standing custom, principles of justice and divine sanction, demanded a reorganization of government so as to secure to them their most cherished rights. Political democracy is the outcome of this movement. Its development in any state can be traced by noting historically how one right after another is secured, guaranteed and made part of the unwritten or written constitution of the state, and how these privileges, at first the prerogative of the few, gradually were won by the many and finally come to be looked on as the inherent right of all. These rights were not won by the people from their governments without many struggles, and English-American history marks by its revolutions these struggles, which resulted in such

guaranties of rights as may be found in Magna Charta, in the several bills of rights of the seventeenth century, the bills of rights of the American colonies and in their constitutions and the numerous constitutional guaranties of the nineteenth century in both countries. Influenced by these movements came the revolutions of France, with its Declaration of Rights and its series of written constitutions. The joint influence of these several centers of constitutional agitation is plainly marked in the fundamental laws of Latin America.¹

These rights are all derived from the one inherent fundamental right, the right to life. All other rights pale into insignificance in comparison with the right of every man to live out to the full the life imparted to him. Ethically speaking, every person who fulfils his social obligations should be allowed to enjoy the privileges of life under the guaranty of the state. This fundamental right differentiates into numerous individual rights, more or less carefully defined, secured and guaranteed, according to the degree of development of intelligent democracy in political communities. Every citizen, for instance, should have his life safeguarded and secured from harm by the military, police and judicial power of the state. In order to feed his body he must be allowed to engage freely in economic occupations, and should have the aid of the state in multiplying and strengthening his economic opportunities and in safeguarding his property. In order to per-

¹ For illustration of this, see article by the author on "The Spanish Source of the Mexican Constitution of 1824," *Texas State Historical Quarterly*, January, 1900.

petuate his race he must be allowed the privilege of marriage and parenthood and be protected in his family rights. In order to develop to the utmost the higher part of his nature, he must be allowed the privilege of freedom of conscience and of worship, the privilege of thinking freely and expressing his thoughts openly, and he should be aided to attain such development by governmental encouragement of education and a free press. Finally, in order that he may maintain his rights and the better fulfill his obligations, he should be given a voice in the government. Rights won by the energy and self-sacrifice of one generation may readily be lost by their descendants. Constant vigilance and civic patriotism are the only safeguards of liberty, and no governmental guaranty of rights can be effective unless made so by an active citizen body who stoutly defend and augment the work of their fathers.

Such guaranties evidently depend not so much on a form of organization as on a general intelligent understanding of the forces at work in political life.

How rights are safe-guarded. If all men should attain maturity in intellectual development, public opinion, working through a democratically organized government, would be amply sufficient for all purposes. But human beings are only partly intelligent. Peoples even of the highest civilization betray on occasion their savage ancestry. Under such conditions men often fail to see a question in its truer meaning, and form partial and distorted opinions in regard to public policy. Hence there regularly exist in political communities factions and parties, each favoring a policy that in its opinion is essential to public welfare.

The existence of these factions or parties provokes discussion, and out of discussion may arise wisdom and conviction. In our present stage of civilization, therefore, political parties have an important function; through them rights are won or lost, and policies good or bad adopted. They become an agency through which the citizen body works, in order to attain what at the time seems expedient and best. For this reason an outline of their development and organization becomes necessary.

Political Parties

In despotisms such differences of opinion find no formal expression, and tend to degenerate into intrigues for place and power. In old-fashioned monarchies and aristocracies a ruling class has power, and maintains it permanently unless overthrown by war or revolution. Under such systems assassinations and armed rebellion are the chief means whereby an unpopular government may be overthrown. A great advance was made when the principle of election was definitely established in governmental organizations; war chiefs and rulers were thus chosen almost from the beginnings of political life. A still greater advance was made when elections became frequent and affected not simply the head of the state but all officers of importance. This development, so well known through Greek and Roman government, has proved to be a powerful agent in securing stability and peace. For when the system of election has become a familiar device in political life, if a body of citizens become in-

The party
system.

censed at the policy of those in power, instead of rushing to arms as formerly and risking all on their success or failure in war, they enter on a political campaign and seek to overcome their opponents at the ballot. If successful, the defeated party resigns power to the victors and awaits an opportunity to regain supremacy at the next election. Such a system has obvious advantages over the old method of rebellion or assassination. It can be at its best, however, only when all really important interests can thus express their opinions, otherwise revolutions will alternate with elections. It is essential also that the electorate be fairly intelligent, so as to decide wisely in regard to opposing policies, and also that they have a proper regard for law, so as to use honest methods in elections and to be willing to abide by the result.

Evidently, therefore, an efficient party system can be found efficacious only when all interests are properly represented and when the electorate is made up of intelligent and law-abiding citizens. The evils so prevalent in the elections of democracies are not inherent in democracy, but are due to the neglect of fundamental principles; interests are not properly represented, large numbers of the electorate are often illiterate and ignorant of political issues, and party managers too often violate every law of political ethics in their eagerness for victory. Yet "bossism" in politics is, after all, merely a passing phase of a period of transition. The so-called practical politician is often the veriest tyro in actual knowledge of political principles. His policy is crude and shortsighted. Perma-

The basis
of success.

ment success is based only on a fostering of economic interests of all the people and on a strengthening of their intelligence and morality. Corrupt politicians may seem to succeed for a time, but they ultimately earn for themselves only contempt and dishonor. All experience shows that honor in the political annals of any country is paid only to those men who despise trickery and dishonesty and who labor intelligently for the larger interests of their fellow-citizens.

Obviously, therefore, the true policy of government should be to encourage by its laws intelligence and honesty in government. Corruption and betrayal of trust should be sternly punished, electional systems should be so adjusted as to favor honest voters and to encourage free expression of intelligent opinion. No wise democracy can afford to allow the primary, the convention, the ballot and the count to be so manipulated as to thwart the will of the electorate. The machinery of government should not be adjusted for self-destruction but for the accomplishment of the best work in the most economical manner. An intelligently educated citizen body with guaranteed civil and political rights and with proper facilities for the expression of its will, may always be depended on to assert its privileges and express its will. Democracy demands energy, intelligence and aggressiveness for its maintenance, and these must be purposively fostered by the state as an indispensable condition of its own prosperity.

The modern party system originated in England through the cleavage brought about by the revolution of 1688 and the separation of interests that arose be-

tween the supporters of the new dynasty and those who favored the old. The real interests of the kingdom were, however, so poorly represented in parliament that parties were really made up of combinations of

Origin of
parties.

factions, voicing petty or personal interests rather than the general interests of the state.

The reform of parliamentary representation, which began with the Act of 1832, allowed the truer interests of the kingdom to be represented with a fair degree of accuracy. The result was the development of the English party system, which has been imitated with more or less success in most of the advanced nations of modern times.

In the United States of America the higher development of political life and the early rise of definite issues, such as those of the union, the tariff and slavery, resulted quite early in the formation of clearly defined political issues and the development of political parties so thoroughly organized that they seem to represent the highest possible type of political combination. Differences in systems of party organization can be seen by noting the main features of the three chief types at present existent:

- (1) The English party system is a loosely organized aristocratic organization. The leaders of each party, who, if the party be in power, form the ministry of the king, virtually dictate the platform and policy of the party. The local organizations of the party control their own districts but seek to harmonize their policy with that of the national leaders. These, through a national council, may

The three
types of
party
organiza-
tion.

assist the local organizations in their campaign by sending speakers and "literature." The leaders of the party successful at the polls assume the reins of government, formulate its policy and remain in power as long as they can control a majority vote in the house of commons. An adverse vote on some question of importance results in their resignation, followed by a new election.

(2) In France there is practically no national organization of parties except such as exist by tacit understanding. Each electoral district carries on its own campaign without dictation or assistance from a national organization. Each candidate issues his own platform and, aided by his friends, advocates his own election. Elected members assemble in groups or factions according to general unanimity of feeling, and that group of kindred factions having a majority of votes will name the ministry and assist it in the formulation of national policy.

(3) In the United States of America national elections occur at definite intervals of two and four years. Each party manages its campaign through a central or national committee. This committee is named by a national convention made up of delegates from the commonwealths. These are appointed by state conventions made up of elected delegates chosen in the first instance by the voters of the districts or townships of the commonwealth. In this way the national committee is theoretically supposed to voice the wishes and policy of the party voters themselves, and in its work uses as its agents the various local organizations existing in the several commonwealths. The national convention like-

wise formulates the national platform and names the presidential candidates. The congressional candidates are named by conventions in the commonwealths. For that reason the national parties become also state parties, and press their organization down to the primaries so as to control the several sets of delegates who ultimately will name the congressional candidates.

These three types of political party organization represent practically the several systems of organization in use among developed nations. The American type is the most complex and the most highly organized and centralized, but the powers actually exercised by the organization are delegated by the voters themselves, who by theory indirectly name all leaders and policies. The French system shows the national party organization to be an artificial unity, made up frequently of discordant parts not fully in sympathy with their elected leaders in the ministry. The real power lies in the local district and its elected member, who is a party in himself and merely confederates at will with like-minded fellow-members.

The English system by contrast is aristocratic and takes its tone from the will of its natural leaders, who have pushed themselves to the front and dictate policy to the districts. The opinions of local leaders, however, must always be taken into account, in order that there may be cheerful and enthusiastic coöperation on their part with the national leadership and policy.

Parties are properly social organizations and not part of the legal machinery of the government. They originate or disband at the will of their members and not

in accord with a law of the state. But so important are these organizations in modern states that governments regularly seek to regulate them. The extent of this regulation is worthy of notice. The state as a rule specifies the time, place and manner of conducting elections, and in some of the American commonwealths even regulates the primary or caucus.¹ It may regulate the system of nominations, fix the form of the ballot and provide officers to supervise the polls and to count the ballots. It may even bear the expense of conducting primaries and the polls, and may legislate against corruption and bribery and limit the amount of legitimate expenses. By law it defines what persons may exercise suffrage privileges at the polls, and may also define suffrage rights at the primary. Voting has even been made compulsory in certain communities, but with small success.²

Obviously the extent of regulation will vary considerably in different states, but the necessity of some regulation is so manifest that no state which allows political parties to exist at all permits them to act without any regulation whatsoever. The system is an excellent illustration of the fact that any social organization, whose interests become of general importance, must submit to governmental regulation for the welfare of the state.

¹ The primary is the initial gathering of party voters to decide on candidates or measures. The term *caucus* is often used in the sense of a primary, but is more properly a gathering of party leaders or representatives for the formulation of a party policy.

² For illustration, see Lowell, "Continental Parties," vol. ii, p. 273.

The issues that separate political parties are generally economic. The state is so important a factor in conserving and strengthening economic interests that these eagerly seek to have a dominant voice in governmental policy. Parties as a rule tend to identify themselves with one or several kindred interests so as to secure the support of those engaged in such economic occupations. There will regularly be representation of such interests, for example, as those of land, commerce, manufacturing, mining and fishing; or there may be a representation of economic classes, such as labor parties or agrarians; or, again, some economic policy that will affect numerous classes may be under discussion, as socialism or the tariff or questions of coinage. Occasionally there may be special issues of temporary importance involving questions of religion, morality, education or some particular phase of international policy. But these issues are not lasting nor are they broad enough to form the basis for a permanent national organization.

Again, entirely independent of the particular issues at stake, a party may gain strength by posing as a representative of conservatism, favoring a policy averse to change and thus securing the support of those who prefer known ills to possible dangers. On the other hand, a radical aggressive party may win support by advocacy of fundamental changes, on the ground that such are in the line of progress. As a rule, it will be found that the issues involved in an election turn either on an economic question or on the maintenance of the *status quo*.

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CHAPTER XIV

CITIZENSHIP

RESIDENT within a state are regularly two classes of persons, *citizens* and *aliens*. The citizens of a state are those persons who are domiciled within the state and are fully subject to its sovereignty.

Citizens
and aliens.

Aliens are those persons resident in a state who owe allegiance to another state.

Briefly, it may be said that the rights and obligations of aliens are fixed by the laws of the land in which they are resident, including in the term *laws* those treaty regulations made with other states fixing the status of their citizens. In general, civilized states grant to aliens full protection of life and property, conditioned on their obedience to the law of the land. They are seldom allowed political privileges, such as office-holding or suffrage, and are regularly exempt from military service, but they may be required to pay the usual taxes assessed on property.

In law there are two classes of citizens: (a) citizens by birth, and (b) naturalized citizens who were born under foreign sovereignty. Corporations or artificial persons are sometimes called quasi-citizens.

Classes of
citizens.

A corporation is an organization authorized by law to act as a single person for the purpose of transacting business or holding and transmitting property. The

duration of its life is regulated by law and is usually specified in its charter; its rights and obligations are civil, not political.

Naturalized citizens are regularly granted the same status as native-born citizens, but certain high offices may be withheld from them. Native-born citizens only, for example, may aspire to the presidency of the United States of America. No alien may claim naturalization as a right. It is a privilege which may be granted or refused to him by the land of his residence at its own discretion. As the allegiance of every person is owed to the land of his birth, states usually regulate by treaty the relations which their naturalized citizens bear to the country of their former allegiance, if these should happen to travel or temporarily reside in it.

Generally speaking, it is true that citizens by birth have superior rights in a state in comparison with corporations and naturalized citizens. It must not be inferred, however, that all native-born citizens are equal in rights. In democracies the theory is that all persons are equal before the law, should equally enjoy the protection of the law and should have the same rights and owe the same obligations. In practice, however, exceptions are regularly made in the case of persons under guardianship, such as immature children and persons of unsound mind. For historical reasons a similar discrimination is made against women, who seldom enjoy so large civil and political privileges as men nor owe the same obligations. To-day, however, in some countries discriminations in political rights based on sex have been

removed.¹ Again, intelligence is so essential a qualification in democracies that illiterate persons are often denied political privileges. For a somewhat similar reason these privileges are sometimes refused to persons who do not possess a fixed minimum of taxable property, the assumption being that a man incapable of acquiring property lacks proper intelligence. Naturally, also, in all states full rights of citizenship are refused to persons convicted of crime and subject to punishment.

In states having aristocratic or monarchical governments there are other discriminations based on class distinctions. Ignoring those arising from social and religious codes we find in such countries classes varying considerably in their respective rights and obligations. Among these may be mentioned (1) the governing classes, including royalty, nobility and priesthood, and (2) the economic classes, including merchants and traders, artisans and mechanics, farmers and peasants, serfs and slaves. The extent of variation found in the sum of rights and obligations depends on local conditions, and the system of each state must be studied separately.

The Rights of Citizenship

There is an important distinction to be made between ethical and legal rights. Political philosophers on reflection often conclude that all men are entitled to such rights as will enable them to develop to their highest capacity. The American Declaration of Independence,

¹ New Zealand, for instance, four of the six commonwealths of Australia, Finland, and four western states in the United States have enfranchised women.

for example, asserts that "all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." In these days, also, men talk about the "right to the land," the "right to a living wage" and the "right to work." These are "natural" rights in the sense that they voice ethical and economic ideals toward which men may strive. But they are not legal rights unless they are recognized by the law of the land and are secured to citizens through the courts or other governmental agencies. In a progressive state legal rights will approximate toward rights claimed by idealists, but as legal rights, on the whole, represent the practice of the community, there will always be a distinction between them and the rights demanded in ethical systems. Rights, therefore, in the legal sense, are not inherent in the individual, but arise from and depend on the law of the land.

Legal rights may be divided into two kinds, civil and political. Civil rights are concerned with the protection of life and property. Political rights enable their possessor to share in the exercise of governmental powers.

From the international standpoint all persons enjoying full citizenship are recognized by modern states as having the right of expatriation, that is, a citizen may voluntarily renounce or abandon his allegiance to the land of his birth. On the other hand, a citizen may travel in foreign countries and claim protection for life and property from his state. Within the bounds of his

state a citizen has the right to demand that his life and property be protected against foreign foes, against riot and insurrection and against assault and robbery. Even if a citizen merely suspects that his life or property is endangered, he has a right to demand that the state take proper precautions so as to safeguard him. Property must not be understood in the sense of material goods only, it includes intangible property, such as claims and rights arising from inheritance and contracts. Under this head also comes the protection afforded to one's rights in family. The law secures to him his share in inheritances, grants him freedom in contracting marriage and secures him in his marital and parental rights. The sanctity of his home is guarded and severe punishment visited on violation of chastity. This protection of life and property is afforded by the state through its war and police powers and the several agencies associated with these. These agencies must be made efficient, for the proper protection of life and property is fundamental to the stability of any state. It inspires confidence, stimulates devotion to government and encourages industry and frugality.

In modern times the influence of democracy is deeply affecting the policy of the state in respect to life and property. In addition to protection, emphasis is now placed on development. Life should be broadened and made happier, and opportunities should be furnished so as to allow larger possibilities in the acquisition of property. Hence citizens have the right to migrate freely, to acquire and hold property, to engage in any honorable occupation, to form business

General
welfare
and hap-
piness.

contracts with their fellows and to demand governmental assistance in the general economic field. This aid the state may furnish through the building of roads, bridges, canals, irrigating works and systems of transportation. It may encourage commerce and manufactures by subsidies, tariffs and technical instruction. It may furnish facilities for business transactions through a postal service and through banks and a stable means of exchange; it may develop agriculture by scientific investigation and experiment. These functions which seem optional are really necessary, are demanded by citizens and are practically extensions of rights, since citizens insist in their demands that the state promote "general welfare."

In the same way the right to life now involves the "pursuit of happiness." Happiness implies liberty of mind and freedom for mental development. In consequence, in most modern states, citizens are at liberty to think freely and may express their thoughts openly in conversation, in print or on the public platform. They may assemble freely in public or in private, and have the right to petition the government on any subject whatsoever. In matters of religion they may follow their consciences without interference from the state and may organize whatever agencies they wish for intellectual improvement. In fact, the demand for general and broad education is essentially a right at the present time, since few modern states venture to deny the right of their citizens to secure a liberal education at either private or public expense.

Many of these rights are historic, tracing back to an-

cestral customs and to codifications of these, such as that contained in the Magna Charta. Others represent later struggles for political liberty, such as the English bills of rights of the seventeenth century.

Historical
rights.

The most famous modern statements of rights came in the eighteenth century through the revolutions in the American colonies and in France, and were formulated in the declaration of independence, in the bills of rights contained in the revolutionary constitutions of Virginia, Massachusetts and Pennsylvania, and in the French declaration of the rights of man, issued by the national assembly in 1789.¹ The best short summary, though not complete, of well-recognized legal rights is contained in the amendments to the constitution of the United States of America.

In practice, the exercise of rights is subject to reasonable regulation. A citizen may speak freely, but he

Limitations
on rights.

must not slander nor libel his fellows; he may criticise governmental policy, but he must not incite to violence; he may worship God as he pleases, provided he is not immoral in his religious practices; he may engage in any business he pleases, provided it is not unlawful; he may enter any profession, provided he has the requisite skill; he may marry whom he wishes, provided the woman gives consent and he has no other wife. Such regulations are often specified in the laws; in other cases they are worked out by the courts, which act on the principle that the law allows to every citizen the utmost freedom consistent with the rights of others and the general welfare.

¹ See reference at end of Chapter XIII.

Rights, as already said, are based on the law of the land and secured through governmental agencies. But if the citizen body as a whole has no voice in the making of laws, and if the government is controlled by a comparatively small per cent of the citizens, there would be no real assurance that general rights of life and property would be safeguarded. Experience shows that a small class in control of the law and its administration too easily inclines to neglect general interests, especially when these are in conflict with its own private interests. For such reasons there have been from time immemorial demands such as these:

Political
rights.

(1) That office be considered not a private right but a public trust, to be administered by responsible persons, who may be called to account for violations of law. (2) That the law be definite, and open to the knowledge of all. (3) That the citizen body have a determining voice in the making of law, either directly or through representatives. (4) That the electorate or body of voters include the largest possible per cent of the entire citizen body. (5) That the judicial system be so administered as to secure to all citizens their rights.

These demands are now acknowledged in democracies and in consequence a large proportion of the citizen body have the political right of suffrage. This power has been wielded so effectively that other important political rights have been secured one by one.

In addition to the right of manhood suffrage, there is: (1) The right of every voter to aspire to any office in the state. (2) The right to fill offices through election or through elected representatives, and the right to hold all

officials responsible for inefficiency and misconduct in office. (3) The right to determine directly or through representatives the fundamental law of the land, whether expressed in a written or unwritten constitution; and, in addition, the right to formulate all other legislation. (4) The right to discuss freely and to criticise openly governmental measures, policies and officials. (5) In English-speaking countries, the right to assist in the settlement of judicial cases by jury service.

In these rights the essential point is that the citizens themselves directly participate in the exercise of governmental functions, or name from their ranks those who shall perform these activities in the name and for the welfare of the people. President Lincoln ably voiced the democratic ideal in his famous Gettysburg speech, in expressing his determination that "government of the people, by the people, and for the people shall not perish from the earth." Naturally, the complete attainment of this ideal is possible only in high civilization, but all modern nations tend to enlarge more and more the political rights of their citizens.

These rights have sometimes been attained in advance of a general capacity to use them wisely, with the result that inefficiency and corruption become common. Experience, however, which is always the best teacher, brings home the lesson of misgovernment in heavy taxation, excessive death rates and economic disorders. Democracies, therefore, tend to emphasize at the present time character and intelligence as prerequisites for suffrage; with the proviso, however, that the state furnish free general education and further morality, so as to de-

velop its citizens into persons capable of an intelligent exercise of the suffrage. Compulsory education and an efficient system of schools are the safest guaranties of a democratic suffrage. Should these not be in evidence, a more aristocratic form is preferable until political intelligence becomes common.

The Duties of Citizenship

The fundamental duty of all citizens is obedience, allegiance and fidelity to the state. The state voices the unity, the will, the collective interests of the entire community. Its commands, therefore, must be obeyed, its interests are superior to private interests, and, in general, no ties should be considered more binding than those that bind citizens to their country.

The duty of allegiance implies the duty of service. This may involve service in war, or in the maintenance of domestic peace, or service in public office, or on public works, such as roads, bridges, buildings and fortifications.

Every capable citizen in theory may be summoned to serve in the army or navy of his country. This may involve compulsory service for a stated term of years, as in France or Germany; or, as in Great Britain and the United States of America, in addition to a small standing army, citizens may be encouraged to form volunteer forces, and by training in times of peace become a nucleus for the larger army needed in war. In case of necessity, however, every citizen capable of bearing arms may be summoned to war and is in duty bound to serve

his country to the best of his ability. On a smaller scale citizens may be summoned to assist the authorities in the suppression of riots or rebellion, or to aid in the arrest of disturbers of the peace.

The same principle applies in respect to service in office. Inasmuch, however, as offices now are regularly salaried and are honorable, office-holding seems to be a privilege rather than an obligation. Yet if the burdens of office should outweigh its emoluments, the state could compel its subjects to assume office. This is exemplified by jury service, which is shunned and yet is compulsory.

Service on public works is no longer common, though still known. In many rural communities of the United States of America, service for several days in the year on the public roads is often required. In case of urgent need, however, the state can always demand the services of its citizens, and in times of war or sudden disaster private citizens are forced into service and compelled to labor without pay. This was illustrated in San Francisco and in Italy after the earthquakes, where citizens were compelled under penalty to assist the soldiery in subduing the conflagrations.

Taxation largely takes the place of compulsory service in modern states. When citizens become free it is often detrimental to their interests for them to perform state service and neglect their own affairs. Hence they readily grant a small per cent of their income in lieu of service. This proves advantageous to the state also, for with money it can hire willing workers, always more efficient than compulsory service. In mod-

¹ See pages 65-69.

ern states, therefore, the government through taxation secures means to support a well-trained permanent army and navy, capable officials and skilled labor for public works. As the citizens themselves fix their own tax rates in democracies, settle the items for expenditure and supervise the auditing of accounts, friction is thereby avoided. Government and people harmoniously coöperate in furthering general interests, for all recognize that joint success is individual benefit and that the injury of any part becomes the detriment of the whole.

One implication from this power of the state to demand service and tax is that it may deprive its subjects of their property at will. This theoretical power, however, is rarely exercised in modern times. The state may, if necessary, take away or even destroy property without compensation; and this is frequently done in times of war, conflagration, famine or pestilence. But if the general safety is not involved, our modern theory of rights demands that the state pay full value for all property confiscated for public purposes. Hence in the United States of America, for instance, though the state under the so-called power of eminent domain, may take land and other property for public use, the law provides that it pay adequate compensation to the owners, the amount of which is left to be determined by the courts.

Political writers fully recognize that the power of taxation is the very heart of modern governmental systems. Arbitrary and unequal taxation discourages enterprise and economic energy; antiquated methods of taxation are ruinous to progress. The best thought and wisest administration must be given to this department. At

the same time corruption is most likely to flourish where the "spoils" are. For such reasons the modern battles of democracy have regularly raged about principles of taxation. In England the struggle has been for the "control of the purse"; in the American colonies, that there be "no taxation without representation"; and in general, that all taxation be for public, never for private, interests. The motive in such struggles is not necessarily mercenary; experience shows that when the citizen body as a whole controls the tax rate and expenditures, public policy loses its military aspects and attention is concentrated on the upbuilding of internal improvements and systems of general education. In place of war come art, science and happiness. When such conditions exist, patriotism ceases to be a duty and becomes a pleasure. A citizen realizes that his welfare and that of his kinsmen and friends are involved in the welfare of the state. The natural love for the land of one's birth is strengthened by an appreciation of its helpfulness in securing happiness and prosperity. Patriotism is, therefore, intensified in devotion and government grows in efficiency, since officials know that they can rely on popular support, and citizens understand that the government has their best interests at heart.

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CHAPTER XV

MODERN DEMOCRACY

Its Development

IF by the term *people* is meant the collective mass of population domiciled within a state, the relation of such people to the state is obvious; they are its subjects, owing it obedience and allegiance. But they are not mere subjects; they are citizens also, for they have rights as well as obligations. After all, the only justification for the existence of a sovereign state must be found in its helpfulness and utility to its people. It owes to its citizens protection and aid in their struggle for betterment in life. Every citizen may demand that much from his state, and should rightly feel aggrieved if it fails to do its part. Yet the failure of the state to do its part has been the problem of the ages and will probably remain so for many years to come. States do not satisfy the demands of their subjects in these respects, and indeed governments have seldom admitted that they were in duty bound so to do. The reason for this difference of opinion is not far to seek. Governments have regularly been aristocratic in the sense that the power of the state has rested in comparatively few hands. The members of this ruling class always assume that they have a sort of inherent if not divine right to

rule, either because of the quality of their birth or their wealth or their intelligence. As rulers, they also assume that they are entitled to the best and largest share of the comforts of life, and that this share should first be secured before much thought be given to the well-being of the other members of the community. This attitude of mind is observable in all parts of the world and in all kinds of civilization. The wise and the strong naturally win the rewards of life, and it is assumed that the weak and the lowly should be content with bare subsistence.

On the other hand, the democratic ideal of citizenship has always had advocates. Whether "all men are created equal" or not, seems not so important as the question whether all men can be made equal; and, if so, whether they should not be

The ideal
of democ-
racy.

given the opportunity to become so. Religion has endeavored to answer by assuring men of their equality in heaven or in God's sight, but men rather tend to prefer their equality on earth, possibly so as to be the better prepared for it in the other world. The state has so regularly favored inequality that some theorists¹ hold that equality will become possible only when the state is abolished. Believers in the utility of the state, who also advocate equality, argue that it can best be obtained through the proper utilization of governmental agencies. Whether governments will remain aristocratic or ultimately become democratic is, however, a question for future settlement. For a proper understanding of the tendency in development and the conditions that affect this tendency, however, a short sketch

¹ Anarchists and individualists.

of the development of the democratic idea may be of service.

In primitive hordes and in the early patriarchal period, so far as their systems can be understood to-day, there prevailed in their political organizations a rude sort of democracy, based on the right of every adult male to participate in important decisions. Numerous illustrations of this exist to-day among savage tribes and in village communal life as observed in Russia, India and China. Women generally had civil rights in life, property and family, and at times even had political rights when heads of families.¹ There was, however, a growing tendency for a woman to merge her legal personality into that of brother, father or husband. Likewise the development of a body of elders composed of heads of families and powerful chieftains tended to develop a class of persons having peculiar privileges and unusually large governmental powers. Through war came slavery and a consequent servile class without rights, mere human beasts of the field. The multiplication of wealth in the form of flocks, herds, slaves and landed interests accentuated and fixed social distinctions. Thus developed a system in which privileged classes, noble, learned and wealthy men exercised all political power, forming the electorate of their respective states. Below these were citizens, freemen, having no political rights, but with fairly well-defined civil rights of life, property and family. These, however, were not carefully safeguarded against the tyranny or despotism of the ruling class. At the bottom of the scale were

Tribal de-
mocracy.

¹ In the Russian *mir*, for instance.

freedmen and resident aliens having a few civil rights, and a vast mass of slaves with practically no rights whatsoever.

The next stage of development came with the rise of commerce and industries. Through these developed from the lower classes wealthy, brainy men, too important to be ignored in the governmental system, who slowly acquired larger civil rights and some share in political power. If this form of wealth and influence increased so as to overbalance in importance landed wealth, it became the really efficient factor in the state, sharing powers equally with the older privileged classes, and developing thereby a sort of democracy, a democracy, however, in which the mass of the population—slaves, freedmen and resident aliens—had no voice.¹

In those days popular democracy in the modern sense would have been impossible. Citizenship regularly implied racial kinship; there was no system of naturalization except through the awkward method of adoption. Furthermore, slavery was looked on as a natural and proper condition for inferior and conquered races, and no theorist was rash enough to suggest that such persons should be freed and have governmental powers placed in their hands. Consequently, when the states of the classical period placed the suffrage into the hands of those who were citizens by right of birth, even though these numbered a minority of the population, they believed that they had the most liberal possible form of

¹ The reforms of Solon in Athens and the rise of the *Equites* in Rome are illustrations.

government, and in their theories set up their systems as the ideal of political development.

Many causes contributed to the development of a larger idea of democracy. The Stoic and the Christian teaching of human rights, individuality and brotherhood, and the extension of Roman citizenship throughout the civilized world tended to dignify the individual and to discountenance slavery, especially as this institution was losing its economic importance through the rise of a system of vassalage. The economic development of western medieval Europe along lines of commerce and manufactures emphasized the need of a more energetic laborer than the slave or the serf, as a necessary factor in this development; and the increase of general intelligence through the printing press and commercial intercommunication helped to bring about a condition in which the privileged classes became relatively less useful to the state and began to lose their monopoly of political, social and intellectual privileges. When slavery and its modified form, serfdom, had disappeared from the larger part of Europe, and when militarism and dogmatic authority had yielded place to commercialism and intellectual flexibility, modern democracy became possible and slowly began to push its way into the governmental systems of Europe.

It is well to note that the democratic movement hitherto outlined is fundamentally not along humanitarian lines. It is simply the desire of the more capable part of the masses, who were called into a life of larger activity through economic need of intelligent labor, to

secure for themselves a share in governmental power. Their interests demanded it, and they were willing to fight for it if necessary. But every advance they made afforded a larger place for those immediately below them. As long as there was an increasing demand for more intelligent labor, the supply was forthcoming; and as it came, it sought after political power. This power was, of course, the means to an end. Men desired to be secured in their rights and possessions, and knew that these would be safer as they gained a larger voice in government.

The rapid development of machinery in the eighteenth and nineteenth centuries stimulated a demand for labor of any sort, and all men became important in industrial countries. The free farming lands of the American colonies also called for workers and gave men opportunity to show enterprise and intelligence in the cultivation of the soil. Throughout this period, therefore, developed a strong emphasis on man as man; all alike, it was argued, should have opportunities to attain wealth and power. Stoic philosophy is the form of the theory of natural rights, and Christianity with its ancient emphasis on equality and fraternity again came to the front in support of this new condition. The result was a new sort of democracy. Heretofore political power had developed *pari passu* with economic capacity, but then began a tendency to give political power irrespective of economic capacity. If men were created equal, as the theory was, they ought to have political equality at least, on the assumption that, by the aid of the ballot, every man could win his

The
equality
of man.

proper place in the social system. These two theories of democracy are still in conflict. The one argues that the possession of political power should be based on an intelligent economic capacity; the other argues that every adult, even every woman, should have the ballot, in order to win rights and build up a capable personality. From the first come laws demanding intelligence tested by an educational qualification, and economic capacity tested by the possession of taxable property. From the other come demands that the ballot be placed in the hands of every person, including the enfranchised slave, the illiterate, the propertyless and even subjects in colonial possessions.

In this development of democracy the working of two principles is evident: (1) An economic condition that demands in its workers capacity and intelligence will tend to bestow political rights on such men; (2) broad, ethical, idealistic principles, like that of human brotherhood, may influence a community in such a way that a government may create by law a condition of political equality and then purposively strive to raise the social and economic standards of its people, that they may exercise with efficiency the political powers placed in their hands. We may, therefore, distinguish three historical forms of democracy: (1) Tribal or communal democracy, common among all savage and barbarian peoples and prevalent in the earlier forms of village life. (2) Conservative democracy, based on economic capacity and intelligence, and found generally among commercial communities. (3) Radical democracy, dominated by ideals of human equality, seeking to

Forms
of democ-
racy.

bestow political privileges irrespective of race, sex or social conditions.

The materialistic democracy of the second class easily develops ideals of the third class through its emphasis on broad knowledge and intellectual capacity. Every commercial era is regularly accompanied by utopian dreams of a still broader civilization, when every man will count as one and all men alike, irrespective of birth, will have opportunity to develop the best that is within them, and to attain any station to which their capacity entitles them to aspire. Along such lines dreamed Plato in commercial Athens, the Christians and Stoics under Roman sway, Sir Thomas More in the Tudor period, the Levellers of Cromwell's time and the philosophers of the Social Contract during the last three centuries. The social dreams of agricultural communities are anarchistic, like Tolstoi's, but commercial communities develop socialistic utopias like those of Edward Bellamy¹ and Laurence Gronlund.²

It should be evident, therefore, that democracy is not merely a political system; it is a condition for human development, an ideal of social life and a philosophic attitude of mind in regard to the larger interests of humanity as a whole. In its larger and truer aspects it implies the possibility of the attainment of higher civilization. In its political aspect it is merely the means whereby men attain real democracy; for the ballot in the hands of an intelligent electorate is an Aladdin's lamp, which, rightly used, will lay at its feet the social treasures of the world.

¹ "Looking Backward" and "Equality."

² "Coöperative Commonwealth" and "The New Economy."

No one is yet prepared to prophesy the outcome of this movement toward a radical humanitarian form of democracy. In quiet nooks of civilization, such as Finland, Sweden and Switzerland, in the "Wild West" of the United States, and on the fringes of civilization in Australasia, may be found the vanguard and fighting line of a newer democracy. Casting precedent to the winds, the governments in these localities are pressing to a logical conclusion the teaching that all political power should be exercised directly by the people themselves. In these experimental laboratories they seem to be trying every conceivable political policy. The electorates, made up of every adult man, and for the most part of every adult woman, are dictating the principles of the fundamental law and are working out startling policies of reform. By building up through careful investigation a scientific system of legal regulation, they hope to restrain the monopolistic tendencies of capital and to elevate standards of living for the "submerged tenth" and the "depressed classes." For these purposes the state does not hesitate, in one place or another, to authorize, as necessity demands, governmental ownership of lands, mines, waters and the usual agencies for transportation; nor to embark in all sorts of business enterprises, even to the extent of lending money at low rates of interest to its citizens and serving as "middle man" for them in the disposal of their products. These regions seem more anxious to abolish pauperism and crime than to multiply millionaires; apparently they listen more readily to the demands of labor than to the allurements of capital, and, strangely enough, seem more

interested in the health and education of children than in their exploitation in the industries.

Yet, after all, these commonwealths combined form but a petty fraction of human society, and on the face of it there seems no possibility that such iridescent visions of democracy can ever dominate the idealism of western civilization as a whole. Progress as a rule goes on halting feet and with leaden step. And yet, if ever "young men see visions," there may come in their hearts an enthusiasm for a newer civilization founded on justice and intelligence. Then these seemingly rash and well-nigh chimerical experiments in democracy may pass into history as the silver lining of the clouds that hid a brighter day for mankind.

The Trend of Democracy

From this bare outline are evident the rude beginnings of democracy in the horde and the tribe, its practical disappearance under static patriarchal monarchies, its reappearance with the rise of commerce and modern industrialism and its struggle for rights—rights of life, person, family and property, the right to have a voice in government and the right to combine in a political party so as to advocate a political policy. Generally speaking, five great influences have contributed toward this end:

Modern
democratic
influences.

(1) A marvelous development in the use of machinery, which began in the last half of the eighteenth century in England and which has completely revolutionized the entire economic life of civilization.

(2) The social contract theories of the English-Ameri-

can revolutions and the political influences that followed from the establishment of the American republic.

(3) The powerful changes in political systems brought about by the French theories of equality and fraternity and the influences arising from the French revolution.

(4) The great religious movements of the eighteenth and nineteenth centuries, which stimulated social virtues and emphasized the common brotherhood of humanity.

(5) The rise of a system of free common and higher education and a remarkable multiplication of scientific knowledge.

Economic changes gave the conditions, religion and education stimulated and trained the mind and political theories taught men how to hold fast and to strengthen by political devices what had been won for civilization.

But these great influences show that real democracy comes through increased mentality and implies a highly developed civilization. For this reason it affects the whole of social life, not simply the political aspect of it. It means that in economic life no man should be born into a condition of economic slavery; not that every person should be fed and supported at public expense, but that he should have opportunity to develop his capacity for work in whatever field seems best suited to his personality. This involves a far vaster and wiser system of education than any that yet exists. Plato, in his "Republic," rightly assumed that the chief object of government was the proper training of its citizens. No governmental expenditure brings such tangible returns as that for edu-

Democracy
dependent
on educa-
tion.

cation. Educational systems are yet in their infancy and largely mechanical and unscientific in their operations; but perfection cannot be attained in a day nor through a corps of poorly trained, wretchedly paid teachers.

The Japanese have shown that scientific training is the chief guaranty of victory in warfare. Material resources and a mere form of equality will never bring about national supremacy; nor does success ultimately lie with military prestige and fighting capacity. Broad knowledge, scientific training and technical efficiency are needed in order to develop a people able to accomplish any task placed before them. Democracy ultimately depends on that kind of training, and economic supremacy in the twentieth century will be attained by that state which spends its treasures most freely in the wise education of its citizens.

The influence of the modern spirit of democracy is well illustrated in the broader national aspects of the day. Ancient states, in their relations one to the other, were narrow and intolerant. They were suspicious of one another's motives, treacherous in their dealings and considered war to be their natural condition. Since the development of the democratic spirit, international law and diplomacy have brought about a different attitude of mind. Commercial needs and treaties necessitate joint agreements among states, which meet in international congresses, discuss matters of general interest and agree on broad principles of policy. Joint action is taken whenever possible, rival interests adjusted and harmonized by arbitration and mediation; wars are kept from spreading

Democracy
and inter-
national
policies.

by careful diplomacy, and the terms of peace dictated by a conquering state must meet with the moral approval of other interested states. Through the process of naturalization citizenship assumes a new form. By joint agreement of states a person now may withdraw from his parent state, forswear allegiance to it and secure citizenship in the state of his choice. If in his new home he prefers to retain his natural citizenship, he will be as carefully safeguarded in his rights, though an alien, as any citizen of the land. This great privilege, now so freely granted, is rapidly breaking down narrow racial barriers, as citizens of many states, persons of different races, mingle in social and business life, exchange ideas, intermarry and develop a cosmopolitan race and civilization that ultimately may banish entirely the spirit of suspicion and war.

In their internal policy states rely less on the clinched fist and more on the gray matter of the brain. Intelligence at home is a guaranty of success abroad. Service in consular and diplomatic administration increasingly depends on trained and proven capacity. The quality of the personnel of the civil service is steadily rising through administrative requirements; improvements in governmental machinery are eagerly sought and tried, and legislation is losing much of its former crudeness and becoming scientific.

The spirit of democracy also implies a kindlier and more sympathetic religion and higher standards in moral life. This is shown by the growing humanitarianism of religion, and the rise of numerous agencies for the alleviation and banishment of human suffering. Criminal

codes are becoming humane, cities are vigorously pushing the betterment of vicious conditions in social life, and labor organizations countenanced by the state are working earnestly for the social and economic improvement of their members. Intellectual development, freed from the incubus of dogmatism, has broadened out into an attempt to understand the whole of life, and through its achievements in science has made modern civilization progress by leaps and bounds. The spiritual and the esthetic side of life has been deepened by a truer insight into ideals of harmony and beauty, derived from a wider experience and knowledge of physical and mental phenomena. Life for the average man has become a happier, broader and more generous existence than that endured by his fathers. We realize now the futility of the old belief that goodness and wisdom are innate only in the privileged classes. By throwing open the opportunities and prizes of the world to all men, irrespective of birth, latent energy and capacity have come to the front. One needs but to investigate the pedigree of the greatest men of modern times to see that a few centuries ago the ancestors of such men were probably slaves and serfs. Had old-fashioned conditions persisted, the great achievers of modern civilization would in most cases be humble laborers on the estates of some robber baron. After all, the real aim of social life is not to develop a small class of highly developed persons of special privileges, but rather to attain the real aim of the state, the development of an energetic, intelligent, citizen body and high standards of social life.

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